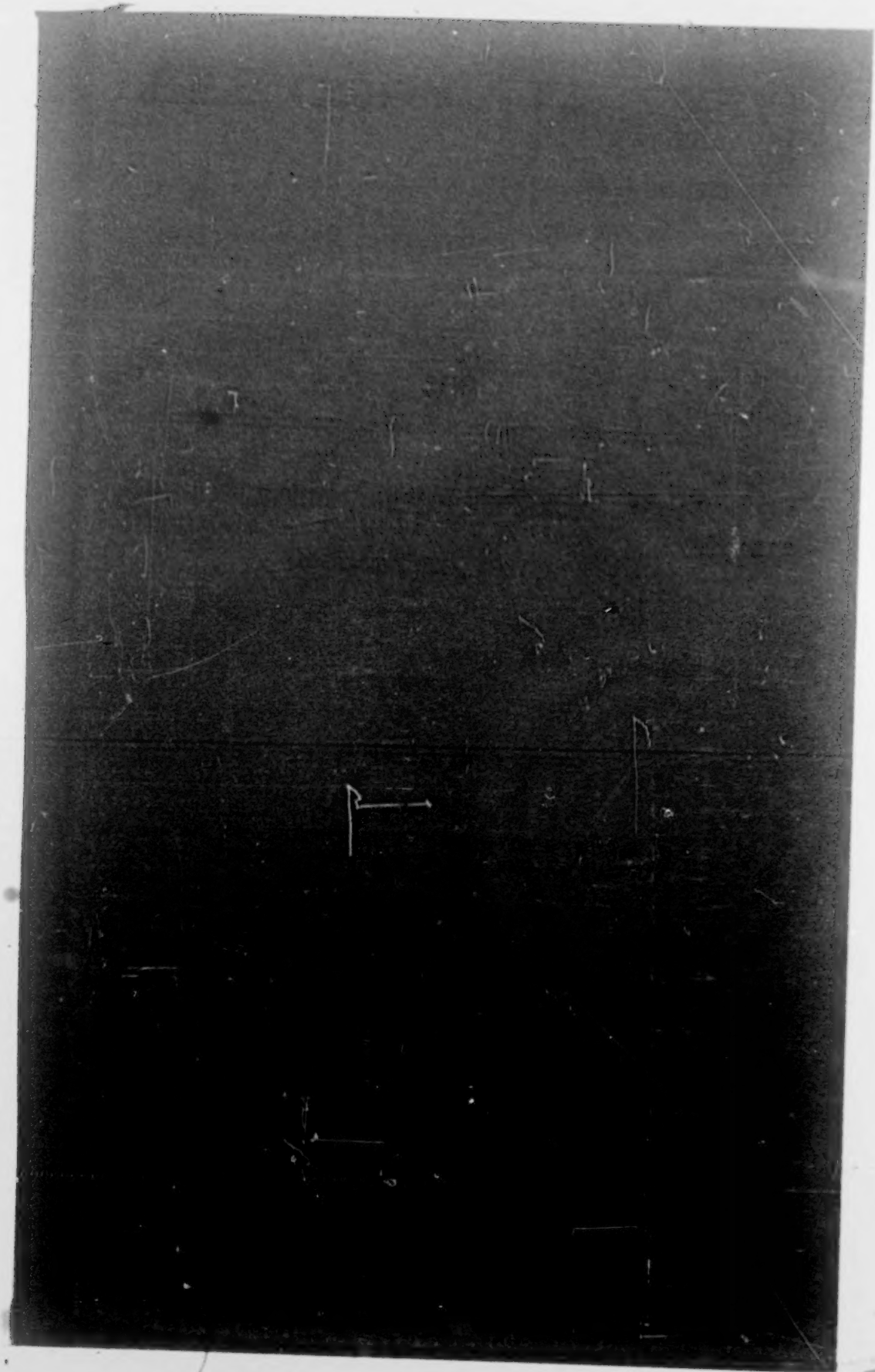

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 566

GUARANTY TRUST COMPANY OF NEW YORK,
PETITIONER

v.

THE UNITED STATES OF AMERICA

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 257–274) is not reported. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 281–291) is reported in 91 F. (2d) 898.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Second Circuit was entered August 23, 1937 (R. 292). The petition for a writ of certiorari was

filed November 9, 1937 (R. 293), and was granted December 13, 1937 (R. 293). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Does the record disclose the unequivocal repudiation necessary to begin the operation of the New York statute of limitations. In any event, does the record disclose an issue of fact to be tried on this question of unequivocal repudiation.

2. If there was an unequivocal repudiation, was notice of the repudiation, sufficient to bind the owner of the deposit, given.

3. Did the statute of limitations run during the period in which the Soviet Government was barred from suing in our courts.

4. Is the New York statute of limitations intended to run against a foreign sovereign, and, if so, has New York power to enact such a statute.

5. Under the Federal Rules of Decision Act, is the New York statute of limitations applicable in a law action by a foreign sovereign in a Federal court.

6. Under the Federal Rules of Decision Act is the New York statute of limitations applicable to this action by the United States in a Federal court.

7. May a statute of limitations be invoked to defeat a claim asserted by the United States, even

though the remedy may have been barred in the hands of its assignor.

8. May a claim asserted by the United States under the international compact with the Soviet Government be defeated by a state statute of limitations.

INTERNATIONAL COMPACT AND STATUTES INVOLVED

The applicable international compact and statutes are set forth in the Appendix, *infra*, pp. 98–118.

STATEMENT

On or about July 15, 1916, the Imperial Government of Russia deposited with petitioner the sum of $25,000,000 in the name of the Foreign Section of its Ministry of Finance (R. 3, 227). Withdrawals on this account were to be made by cable, confirmed by a letter bearing two signatures authorized by the Ministry of Finance (R. 228–229, 248–253). This account was under the direct control of the Ministry of Finance, and supervision thereof was never entrusted to any diplomatic representatives of any government of Russia in the United States (R. 157, 175).

On March 16, 1917, the Imperial Government of Russia was overthrown, and was succeeded by the Provisional Government of Russia, which was recognized by the United States on March 22, 1917 (R. 216–217).

On January 23, 1917, Mr. Serge Ughet was designated as the representative of the Ministry of

Finance with the Russian Supply Committee in the United States (R. 116), and on April 4, 1917, was appointed as Financial Attaché of the Russian Embassy (R. 185).

On July 5, 1917, Mr. Boris Bakhmeteff was officially received by the President as the Ambassador of Russia (R. 217).

On July 2, 1917, the account in question being overdrawn, the sum of $5,000,000 was deposited with the petitioner by Ughet on July 12, 1917, acting under orders of the Ministry of Finance, by transfer of funds from the Russian Government account in the National City Bank (R. 80, 110–111, 175).

On November 7, 1917, the Provisional Government was overthrown, and was succeeded by a government which is now known as the Union of Soviet Socialist Republics, hereinafter referred to as the Soviet Government (R. 217). At the time the Provisional Government was overthrown, there remained on deposit in the account the sum of $4,976,722.78 (R. 3).

On November 28, 1917, the Soviet Government dismissed Bakhmeteff and Ughet as Ambassador and Financial Attaché, respectively (R. 187, 217–218), but the United States continued to recognize Bakhmeteff as Ambassador until he withdrew at the invitation of the State Department on June 30, 1922. Thereafter, and until November 16, 1933, Ughet was recognized as custodian of Russian property in the United States (R. 246, 258).

On November 16, 1933, the United States recognized the Soviet Government, and on that date the fund in question was assigned by that Government to the United States.

After the United States had made demand upon the petitioner for payment of the sum in question (R. 4), on September 21, 1934 it instituted this action (R. 1). Petitioner thereafter moved to dismiss the complaint on the ground that the statute of limitations had run, submitting in support thereof numerous affidavits and two depositions (R. 4–6). The United States in turn submitted a number of affidavits and exhibits in opposition to the motion.[1]

On November 2, 1936, the District Court sustained the motion to dismiss (R. 274–276). On appeal, the Circuit Court of Appeals reversed, one judge dissenting without an opinion (R. 281–291).

SUMMARY OF ARGUMENT

The respondent contends that a decision in its favor on any one of the eight questions presented will determine this case for it and that the petitioner, to prevail, must establish that all of these questions should be determined in its favor.

---

[1] There is sharp dispute between petitioner and the United States on the question of an unequivocal repudiation of the debt by the petitioner, to be drawn from the various affidavits and exhibits. The question is discussed in Part One of the Argument, *infra*.

Part One

I. Apart from sovereign immunity of the Soviet Government and of the United States Government from the bar of the New York statute of limitations, the period of limitations did not begin. The District Court erroneously determined that the petitioner had made the unequivocal refusal to pay the deposit necessary to start the period of limitations. *Tillman* v. *Guaranty Trust Co.*, 253 N. Y. 295. The correct determination from all the evidence is that the petitioner did not make an unequivocal refusal to pay, but even if some of the evidence supported the District Court's conclusion, an issue of fact was created by all the evidence which required that the question of fact should not be determined on a motion to dismiss the complaint on affidavits and depositions. The respondent is entitled to trial on this issue of fact. *Herzog* v. *Brown*, 217 App. Div. 40.

II. The period of limitations did not begin because no notice of any repudiation which the petitioner may have made was given to the owner of the bank deposit or to any one of its authorized agents. Diplomatic recognition of the Soviet Government validates its acts from the beginning of its existence. *Oetjen* v. *Central Leather Co.*, 246 U. S. 297. The Soviet Government became owner of this Russian Government bank deposit when it succeeded the former Provisional Government of Russia on November 7, 1917. No notice of repudia-

tion was given to any representative of the Soviet Government. Notice to Boris Bakhmeteff, Ambassador of Russia under the former Provisional Government of Russia, and to Serge Ughet, Financial Attaché of the Russian Embassy under that Government, did not commence the period of limitations because their status in the United States after November 7, 1917, did not make notice to them binding upon the Soviet Government, the owner of the deposit. Neither of them at any time had supervision or control of this account. Their diplomatic status here was continued by our Government for the purpose of liquidating war contracts in the interest of American manufacturers and bondholders of Russian securities, and does not serve as a basis for the contention that notice of repudiation to them binds the owner of the bank deposit.

III. During the entire period in which the petitioner claims that the period of limitations ran, the Soviet Government was barred from suing in our courts, although it attempted to do so. *R. S. F. S. R.* v. *Cibrario,* 235 N. Y. 255; The Penza, 277 Fed. 91 (E. D. N. Y.). The New York statute of limitations does not run against a plaintiff who has no forum in which to assert its rights. *Oswego & Syracuse R. R. Co.* v. *State,* 226 N. Y. 351, 360.

Part Two

Even if the New York statute would have run against a private owner of this bank deposit, and

even if the United States is in no better position than the Soviet Government, the statute did not run in this case because it is not applicable to a foreign sovereign.

I. Congress did not intend in the Rules of Decision Act (R. S. Sec. 721) that a state statute of limitations could be asserted as defense in an action in a federal court by either the United States (*United States* v. *Thompson,* 98 U. S. 486) or a foreign sovereign which the United States recognizes as its equal. *The Exchange,* 7 Cranch 116.

II. Even if the Soviet Government had instituted this law action in a New York state court, the statute of limitations would not be a bar because it was not intended to apply to foreign sovereigns. The statute does not expressly include foreign sovereigns. The United States is exempt from the statute. *United States* v. *Thompson, supra.* Similarly, foreign sovereigns are exempt. The doctrine of laches, applicable in international tribunals to prevent stale claims, is the only limitation of time applicable to sovereigns. Under public international law, foreign, as well as domestic, sovereigns are immune from suits in the federal and state courts of this country without their consent. The principle of equality of sovereigns upon which this immunity is based requires that foreign sovereigns shall not be subject to state statute of limitations, which do not bind the United States. *United States* v. *Thompson, supra.* The state statute will not be given a construction, not required

by its terms or by any state court decisions, which would depart from the principle of equal treatment of the United States and foreign sovereigns in our courts.

If the New York statute be construed to bind foreign sovereigns, it is invalid in that respect, because it is an invasion of the field of foreign relations, which is exclusively a matter of national concern. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304.

Part Three

Even if a foreign sovereign is bound by state statutes of limitations, the plaintiff in this action, the paramount domestic sovereign, is not subject to the New York statute of limitations.

I. Under the Federal Rules of Decision Act, the state statute of limitations is not a rule of decision in this action by the United States in a federal court, *United States* v. *Thompson*, 98 U. S. 483; *United States* v. *Hoar*, 2 Mason 311 (C. C. Mass.).

II. The New York statute bars the remedy in the New York courts but does not extinguish the right to the bank deposit. *Lightfoot* v. *Davis*, 198 N. Y. 261, 264. An unenforceable debt may become enforceable by assignment. *South Dakota* v. *North Carolina*, 192 U. S. 286. Therefore, even though the Soviet Government had no remedy, the United States has a remedy because it cannot be barred by the New York statute of limitations.

Part Four

The New York statute cannot impede consummation of the international compact which is the basis of this action. *United States* v. *Belmont*, 301 U. S. 324. The exclusive national power over foreign relations was exercised in this agreement without regard to various state statutes of limitations. The equal sovereign contracting parties did not intend that state statutes of limitations, which cannot bind the United States, should impede the consummation of the compact.

ARGUMENT

INTRODUCTION

The petitioner argues in its brief that the New York statute of limitations barred the claim here involved before it was assigned to the United States (Point I, pp. 13–71); that the assignment to the United States did not revive the claim (Point II, pp. 71–83); and that the assignment did not override the state statute of limitations (Point III, pp. 83–91).

The respondent contends that, even apart from sovereign immunity, no unequivocal repudiation sufficient to start the period of limitations was made, or, if made, was not communicated to an authorized agent of the owner of the deposit (Part One, pp. 11–49, *infra*); that the New York statute of limitations is not intended to and can not apply to foreign sovereigns (Part Two, pp. 49–82, *infra*);

that the statute cannot bar the claim of the United States even though the remedy of its assignor may be barred (Part Three, pp. 82–90, *infra*); that the state statute cannot defeat enforcement of this claim asserted by the United States under the international compact known as the Litvinov assignment (Part Four, pp. 90–97, *infra*).

The respondent submits that the petitioner must fail unless it prevails on each one of the eight questions presented.

Part One

Apart from sovereign immunity the statute of limitations did not run

It is assumed, solely for the sake of Part One of this argument, first, that the United States, as assignee, has no greater rights than its assignor, and second, the Soviet Government, as its assignor, has no greater rights than a private citizen suing for a bank deposit. The respondent contends that the statute of limitations did not run because: (I) The petitioner did not establish that it had made an unequivocal refusal to pay the deposit; (II) no notice of refusal to pay the deposit was given to any authorized agent of the owner of the deposit; and (III) the owner of the deposit was prevented from suing in any of the courts of this country during the entire period in which it is claimed that the statute of limitations ran.

I

The petitioner failed to establish an unequivocal repudiation of the debt sufficient to start the period of limitations

The respondent contends (A) that the petitioner failed to establish in the District Court that it had unequivocally refused to pay the debt, and (B) that even if there was some evidence of an unequivocal repudiation, there was, at least, a denial of the fact of an unequivocal refusal and evidence which created an issue of fact on this question which requires a trial of this issue.[2]

A. The petitioner failed to establish an unequivocal refusal to pay the deposit

It is the rule that an unequivocal refusal to pay a bank deposit gives rise to the cause of action

[2] The District Court concluded (R. 260) that there was an unequivocal repudiation. The Circuit Court of Appeals in its opinion did not consider the question at all, and the basis of its decision, that the statute of limitations does not run against a foreign sovereign in this case, made it unnecessary to consider this question. The petitioner argues (Brief, p. 11) that the Circuit Court of Appeals, in holding that the statute does not run against a foreign sovereign, could not "have arrived at that question without first coming to the conclusion that the District Court was right in finding that there was no triable issue with respect to the accrual of a cause of action. If there had been a triable issue in that respect, the Circuit Court of Appeals would have sent the case back for trial." Respondent submits that just the converse is true, and that the Circuit Court of Appeals intentionally refrained from ruling on the question of fact, because such a ruling was unnecessary for the decision.

which starts the period of limitations. *Tillman* v. *Guaranty Trust Co.*, 253 N. Y. 295. The respondent contends that the fact of an unequivocal refusal to pay must be clearly expressed in the conduct of the petitioner *taken as a whole* before it will be charged with, or entitled to rely upon, a repudiation of its obligations or denial of its liability. *Silverman* v. *National City Bank of New York*, 133 Misc. 201, 208–209.

The District Court took the view, expressed in its oral opinion (R. 257–276), that the evidence, consisting of depositions, affidavits, and exhibits, established without a dispute requiring a trial, that the petitioner unequivocally repudiated liability as early as February 25, 1918, when it created the consolidated Russian account (R. 260) discussed below, and that to all inquiries or demands concerning the deposit, the petitioner unequivocally replied that it repudiated liability (R. 267).[3]

An examination of its opinion discloses that the District Court devoted the greater part of its attention and discussion to the question of *notice* of repudiation and apparently thought that the question of *existence* of repudiation was not seriously disputable. The respondent always disputed it seriously and submits that the District Court, in

[3] The District Court properly recognized in its opinion (R. 268) that its view of the facts adopted in determining this motion did not purport to constitute findings of fact restricting appellate review, in the sense of findings of fact after trial.

reaching its conclusion on the existence of an unequivocal repudiation, relied, erroneously, on the isolated fact of the consolidation of the Russian accounts and the facts of refusal to pay the account to persons unauthorized by the owner of the account, as establishing an unequivocal refusal.

The District Court apparently considered the facts of this case as if it concerned an ordinary private commercial transaction involving an unambiguous setoff by a bank in the routine course of banking business under normal political and business conditions. In this we submit the District Court was grievously in error. The alleged setoff and refusals to pay unauthorized persons must be viewed, not as isolated acts, but in the light of the unusual political situation which existed and motivated the petitioner's conduct, and as part of the web of connected circumstances which limit and explain the qualified, tentative, and equivocal nature of the conduct alleged to have constituted a definite repudiation beyond dispute.

An evaluation of the meaning of all the circumstances disclosed even by this record by affidavits and depositions in a summary proceeding without trial, discloses that the petitioner, merely as a matter of careful business practice, refused to pay the deposit over to persons not authorized to draw upon it, and balanced its claims against the Ministry Account, not with the intention of appropriating that account, but conditionally and tentatively, pending negotiations with a stable govern-

ment whenever one should become established in Russia and should be recognized by the United States. An examination of the facts discloses the vice inherent in the District Court's method of considering isolated acts of the petitioner without considering the circumstances which explain, limit, and qualify them.

In July, 1916, this bank account was opened by the Imperial Russian Government by a deposit of $25,000,000 which was part of the proceeds of a loan or credit of $50,000,000 to that Government by a group or syndicate of New York banking firms, including the petitioner. The purpose of the loan or credit was to enable the Russian Government to purchase and pay for war supplies in this country for use in the World War then being waged.

The account bore the title "Section Etrangere Ministere des Finances", the Foreign Section of the Ministry of Finance of that Government. Withdrawals from the account were to be made only by cable from the Ministry of Finance bearing a code test number, confirmed by letters bearing two signatures authorized by the Ministry (R. 228–229, 248–253). This account was in the exclusive control of the Ministry of Finance, and the right to withdraw from, or to supervise, the account was never committed to diplomatic or consular representatives in the United States of the Russian Government (R. 157, 175).

On March 16, 1917, the Imperial Government was succeeded by the Provisional Government, which was diplomatically recognized by the Government of the United States on May 22, 1917 (R. 216–217). Mr. Serge Ughet, designated on January 23, 1917, as the representative of the Ministry of Finance with the Russian Supply Committee in the United States (R. 116), was appointed Financial Attaché of the Russian Embassy on April 4, 1917 (R. 185). On July 5, 1917, Mr. Boris Bakhmeteff was received by the President of the United States as Ambassador of the Provisional Government of Russia (R. 217).

From time to time withdrawals were made from the account in the authorized manner (R. 229) but never in any other manner. On July 2, 1917, the account was overdrawn. On July 10, 1917, the last payment was made by the petitioner out of the account (R. 230). On July 12, the account was credited by a deposit of $5,000,000 made by Ughet in the form of a transfer from the Russian Government account at the National City Bank, upon order from the Ministry of Finance (R. 80, 110–111, 175). The last letter, dated June 21, 1917, from the Ministry with respect to the account was received by the petitioner on August 25, 1917, but the record does not disclose its contents (R. 229–230).

On November 7, 1917, the Provisional Government was overthrown and succeeded by a government which later came to be known as the Union of Soviet Socialist Republics.

By a decree dated November 26, 1917, Bakhmeteff, as well as all other "ministers, members of missions, et cetera, of the Russian Republic" averse to the Soviet Government were dismissed by it from their posts and deprived of any right to perform any State duties or to make payments from State funds (R. 187, 217–218). The United States Government was officially informed of this by its Ambassador to Russia, Mr. David R. Francis (R. 189–218). On June 5, 1918, Mr. Maxim Litvinov was designated by the Soviet Government as its plenipotentiary representative in Washington. Ambassador Francis communicated this fact to the United States Government (R. 182, 218). On March 18, 1919, Mr. Ludwig Martens presented to the Department of State his credentials as representative of the R. S. F. S. R. in the United States (R. 190–191; 218).

It is in connection with these political events and the explicit instructions to the petitioner that withdrawals on the deposit were to be made only by cable and letter from the Ministry of Finance, that the conduct of the petitioner, now asserted to have constituted an unequivocal refusal to pay the debt, must be weighed.

A notation under the date of November 10, 1917, appears on the Finance Ministry account in the form of a notice to allow no withdrawals but to refer to two named officers of the petitioner (R. 80).

Early in December 1917, Ughet left with the petitioner (R. 196) for its consideration a copy of a letter dated November 28, 1917 (R. 107–108) from

Bakhmeteff to the National City Bank of New York declaring that all moneys in that bank standing at his disposal and against which he was authorized to draw (R. 213) should be placed in a new account in his official name and held in trust to pay orders and contracts theretofore placed for supplies for the Russian Army and Navy and other purposes. In a letter dated December 12, 1917, the President of the petitioner, Charles H. Sabin, wrote Ughet that there were no moneys on deposit with the petitioner standing at the disposal of Bakhmeteff, but that there was, however, on deposit with the petitioner, an account standing to the credit of the Ministry of Finance, which was customarily paid only upon the signatures of two of certain designated officials of the Ministry. This letter (R. 108–109) concluded:

> * * * Under present conditions, we do not see how we can honor such cable instructions, nor do we see how we could honor written orders signed by the persons previously designated to draw on this account, without the assurance of our Government that such persons still have authority to act. Nor have we any authority for the transfer of these funds. We must, therefore, for the present continue to hold these funds to the credit of such account.[4]

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[4] Concerning this letter, the District Court said (R. 261): "That, as it seems to me, was not an unequivocal denial of liability by the bank."

Later in December, 1917 or early in January, 1918, Ughet and Sabin conferred at the Department of State in Washington with Mr. Frank R. Polk, Counselor for the State Department. Ughet testified that in answer to Polk's question whether the petitioner would release the deposit to the Russian Embassy, Sabin "pointed out that because the Guaranty Trust Company was having certain claims against Russia in consequence of November events of 1917, that the Guaranty Trust Company, therefore, was not feeling at liberty to release this fund to the jurisdiction of the Russian Embassy" (R. 14). In a letter dated January 31, 1918, to Polk, Sabin enclosed a copy of his letter dated December 12, 1917, and stated: "We have never been authorized to honor checks drawn on this account [the Ministry Account] by Russian officials in this country" (R. 196). Bakhmeteff testified positively (R. 68) that he himself had never attempted to obtain the fund from the petitioner, and had never seen any of the petitioner's officials concerning it.

On February 25, 1918, the petitioner's Russian accounts were consolidated into a single "Russian Government Account" to avail of the Ministry Account to pay the petitioner's alleged claim against the Russian Government for the dollar value of its ruble balance with former Russian private banks. As part of the transaction the Finance Ministry Account was closed by entering on the debit side thereof the exact balance appearing on the credit

side. When the officials of our Government learned of this consolidation in May 1918,[5] they expressed their disapproval of the action (R. 201), and our Government refused to acquiesce in the transaction in any manner (R. 129–130).

A year later, in answer to a letter from Polk dated June 4, 1919 (R. 201–202) concerning the desirability of using a portion of the Ministry Account to meet an interest payment due on the Russian Government loan on July 10, 1919, Sabin replied in a letter dated June 9, 1919 (R. 105–107):

> We hold the deposit for account of 'the Russian Government,' and *shall be under the duty to account for this deposit to a regular and responsible Russian Government whenever such a government is established and calls upon us to pay it or to apply it according to its direction. In the meantime we can only hold it.* We consider that we have no more right or authority to use it now to pay interest on the bonds of a certain Russian loan than we should have to apply part or all of the deposit of any individual with us to the payment of such individual's debts upon our own initiative. *Our action in*

[5] The Government was informed of the consolidation by a letter to the Treasury Department written on May 7, 1918, by Penny, an official of the Federal Reserve Board (R. 200–201). An examination of this letter utterly fails to support the District Court's conclusion (R. 263) that it recited the "notice of repudiation as having been given by Breton to Ughet."

using part of this deposit for such purpose might be disapproved by a future Russian Government.

* * * At that time [early in 1918] we had accounts, including large deposits, in the Russian commercial banks in Russia. Under the circumstances, we considered it necessary and proper to consolidate the Russian Government account and the accounts of the Russian commercial banks, the result being, according to our computation, a credit balance in our favor. This situation, as you will readily understand, gives rise to certain questions which can be satisfactorily settled only upon the restoration or establishment of a responsible government in Russia, when undoubtedly all of them, in so far as they concern American financial interests, will, with the aid of our Government, be properly disposed of. In the meantime, however, as we regard it, both in considering the Russian Government account by itself, *and in considering the consolidated account referred to, any payment made by us now would leave us in a position where we might be required to pay the same amount again.* [Italics supplied.]

This letter, in which the reference to the consolidation of the Russian accounts is coupled with the admission of the petitioner's duty to account for the deposit to a recognized Russian Government, discloses that the petitioner had not made, and did not consider that it had made an unequivocal repudiation.

On July 2, 8, and 11, 1919, meetings of a committee of representatives of the participants in the Russian Government $50,000,000 credit were held (R. 116–126). At the first meeting the chairman of the committee, Mr. John H. Fulton, of the National City Bank of New York, presented a letter from Ughet to him dated July 1, 1919 (R. 121), proposing a request by the committee to the petitioner to release $1,625,000 of the Ministry Account to pay interest on the credit.[6] Fulton sent a copy of the Ughet letter to the petitioner, and a reply dated July 10, 1919, was presented to the committee meeting on July 11, 1919. This reply, signed by Sabin, stated in part (R. 123):

> I wish to state, as I have previously stated, that no one now has authority to draw Russian funds on deposit in this bank, therefore we can not act upon Mr. Ughet's suggestion.

There was enclosed with this reply, a copy of which was sent to Ughet, a copy of the letter of June 19, 1919, from Sabin to Polk discussed above.[7]

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[6] The District Court erroneously construed this letter as a request to Fulton to do what in law amounts to a demand for a turning over by the defendant bank of $5,000,000 deposit account (R. 264). The letter reveals no more than a proposal for the consideration of the protective committee that it should ask the petitioner to release $1,625,000 in order to pay the interest due.

[7] An affidavit of Harold Stanley, vice-president of the petitioner in 1918 and 1919, alleges that he, on behalf of the petitioner, attended a meeting of representatives of

At about the same time another type of negotiation respecting the Ministry Account was in progress between counsel for the petitioner and counsel for the Russian Embassy. The substance of these negotiations can be gathered from a number of letters and memoranda (R. 111–113, 131–151) which indicate that for a period of several months the petitioner expressed uncertainty as to whether it should pay over the account, an uncertainty based largely upon its doubt of the authority of the Russian officials in this country to dispose of this fund. At one time the petitioner's counsel stated that the petitioner felt that the situation with regard to this account was such that it "can not be settled until there is a staple government in Russia," for the reasons that it had in commercial banks in Russia taken over by the *de facto* Russian Government credits exceeding the credit with it by the Provi-

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the interested banking group shortly before the Russian credit matured on June 18, 1919; that Ughet requested petitioner to make Russian funds, thought by Stanley to mean the Finance Ministry bank account, available in the emergency created by the interest due date on the Russian credit; and that Stanley said Ughet had no right to make the statement "because he had known for some time that this money was not available unless the Russian Government paid Guaranty Trust Company what it owed to them" (R. 78). Ughet testified that he remembered the conference but not the details; that he did not know Stanley (R. 40); and that he did not believe that anything was said by him or the representative of the petitioner with respect to payment out of the Finance Ministry account (R. 29).

sional Government recognized by the United States (R. 138).[8]

On another occasion the petitioner's counsel stated that "the officials of the Trust Company believe that the courts would sympathize with its position and probably delay any decision or any action until the establishment of a staple government in Russia" (R. 138). This attitude again shows that the petitioner, pending recognition of a Russian government did not intend to deny liability finally so as to remit the owner of the deposit to an action to recover the deposit at that time.

The respondent submits that an inference of an unequivocal refusal to pay the Ministry Account to one authorized to demand it should not be drawn from these facts. It seems clear that refusals to pay the account to unauthorized persons do not constitute an unequivocal denial of liability. For example, a bank's refusal to B's demand to pay A's account to B, in no way authorized by A to draw on the account, would not be construed as a definite refusal to pay A, and, indeed, a bank might defeat a suit by A based on such refusal on the ground that no proper demand had been made. *Tillman* v. *Guaranty Trust Co.*, 253 N. Y. 295. So far as the

[8] At another time in June 1919 the petitioner's counsel considered the suggested solution, although the petitioner was not committed to accepting it, whereby a check for the balance of the account would be drawn to the order of the Russian Government and that government's endorsement by Ughet guaranteed by National City Bank (R. 134–135).

creation of the consolidated Russian account on February 25, 1918, is concerned, the letter of June 9, 1919, makes it evident that this arrangement was made tentatively, pending establishment of a recognized Russian government with which the petitioner could negotiate. Such conduct by a bank, we submit, does not disclose the intent and should not be construed as the adoption of the position that a setoff was irrevocably and definitely made, giving rise to a cause of action upon which the petitioner required that the owner of the deposit sue in order to obtain payment.

The record discloses nothing further with respect to the Finance Ministry account until, following a letter dated December 2, 1921, from the Secretary of State to the petitioner requesting information concerning the account, on December 7, 1921, Polk (formerly an officer of the State Department but at that time attorney for the petitioner) replied in a letter to De Witt C. Poole, Jr., at the Department of State in part as follows (R. 184):

> * * * The ambassador here never had any authority over it [the Ministry Account], nor did any of the officials in the United States so there is no one clothed with authority to dispose of this fund. The matter was carefully considered by Wardwell and myself as we were anxious if possible to secure some of this money for Russian relief, but we came to the conclusion

> regretfully that even if the Trust Company did not have a lien on the funds for their money taken over by the Russian Soviets, the Company would not be protected in paying out any of these funds on the order of any Russian official. However, all the information that you require will be given in the letter that the Secretary will receive tomorrow or the next day.

The refusal to release the fund, indicated by this letter, is based on (1) lack of an authorized person to whom to pay, which is not an unequivocal refusal, and (2) a "lien on the fund," which indicates not an unqualified repudiation of liability, but a reservation of the right to determine the facts and to negotiate a settlement of the alleged seizures of the petitioner's property in Russia when the recognition of the Russian Government permitted that course.

The letter dated December 9, 1921 (R. 109–110) from Sabin to the Secretary of State, the Honorable Charles E. Hughes, stated that the "Russian Ambassador in this country never had authority to draw on this account and never attempted to exercise any control," and that the account had been applied as a partial offset against the greater amount due from the Russian Government, and that when there was a Russian Government recognized by the United States the claim for the balance would be pressed.

Against this evidence, showing the absence of any intention on the part of the petitioner to make

and convey an unequivocal refusal to pay the fund to its true owner, the petitioner presented several affidavits purporting to contain recollections of several of its officers of alleged events and statements made by or to them during the period under discussion. The contents of most of these affidavits may be summarized as follows: that between November 1917 and March 1924, Sabin or some other person had told the affiants that the petitioner had refused to pay the fund to the representatives of the Russian Government in the United States.[9] Certain affiants claim that they had informed Ughet of the refusal to pay (Breton, R. 224–225) or that Ughet had told them that he was told by the petitioner that it would not pay (Murphy, R. 95). The petitioner also urges what it claims to be admissions by Russian officials in this country of knowledge of unequivocal repudiation.

The respondent submits that any force and effect which the petitioner's evidence may have been intended to have is of necessity dissipated when it is examined, as it should be, in the entire atmosphere of the surrounding circumstances which have been set forth above. Against these recollections the respondent urges the weight of documentary evidence, discussed above, which shows that the petitioner at all times intended to do no more than to postpone payment of this deposit until its real

[9] See, for example, affidavits by Stanley (R. 77); Reyburn (R. 87); Stetson (R. 96).

owner, or persons authorized by it, might assert the claim.

The correctness of the respondent's interpretation of the evidence is particularly confirmed by the fact that on October 14, 1933, and again, in 1934, the petitioner expressed its willingness to arrive at a settlement with the Soviet Government of "mutual claims in connection with ruble and dollar current account balances of the Guaranty Trust Company on the one hand and the Russian Government and/or the former native Russian banks or bankers on the other hand" (R. 207, 208, 211–212). The respondent submits that there is implicit in this offer of compromise an admission of the validity of the claim of the respondent's assignor, and that it shows the absence of any intent on the part of the petitioner at any time to make an unequivocal repudiation of its liability to the true owner of the Ministry Account.[10]

It is a fair inference, from all the evidence presented upon the proceedings below, that the attitude of the petitioner was primarily one of uncertainty; that it did not want to pay this fund to persons whose authority it doubted to the point of denying

[10] It is also to be observed that this recognition of the continued existence of an indebtedness to the Soviet Government constitutes an acknowledgment of the debt sufficient to revive a remedy barred by a statute of limitations. *Waltermire* v. *Westover*, 14 N. Y. 16, 20–21; *Dean* v. *Hewit*, 5 Wend. (N. Y.) 257, 262; *Henry* v. *Root*, 33 N. Y. 526, 530, 532–533, 535.

it; that it felt that the entire problem could be adequately treated only upon the establishment and recognition of a stable government in Russia, until which time it wanted to delay any action; and that because of this attitude it would not pay the representatives of a deposed Russian Government, lest it be compelled to pay the same amount again.

It is submitted, therefore, that there was no such refusal to pay as would be sufficient to start the period of limitation in this case.

B. At least, there is a conflict of evidence which required a trial of the issue of fact of unequivocal repudiation

The respondent earnestly contends that the District Court, on this record, should have found that there was no unequivocal refusal. But even if the view be taken that opposing inferences could have been properly drawn by the District Court from the evidence, the respondent submits that at least a conflict of evidence which entitled it to a determination of this issue, not in a summary proceeding on affidavits and depositions, but in a trial and upon full examination and cross-examination of all witnesses is present in this case.

The motion to dismiss the respondent's complaint was made under Rule 107, subdivision 6, of the Rules of Civil Practice (Appendix p. 99) which provides that the defendant in an action may move for judgment dismissing the complaint, on the complaint and affidavit tending to show that the cause of action did not accrue within the time limited by

law for the commencement of an action. However, Rule 108, (Appendix p. 99) provides, as construed by the courts, that if the plaintiff upon such a motion should deny by affidavit facts alleged by the defendant, the court must [11] order a trial of the issue of fact determinative of the motion before ruling upon the motion. *Giannavola* v. *General Railway Signal Co.*, 244 App. Div. 65. It must so clearly appear as to be without substantial doubt that the cause of action is barred before the court will grant such a motion without a trial of the issue of fact. *Press* v. *Draper*, 139 Misc. 263, 247 N. Y. S. 156, 157. Where a question of fact is put in issue, the plaintiff is entitled to have it tried. Only after it is determined the court may make a final disposition of the motion. *Herzog* v. *Brown*, 217 App. Div. 402, aff'd. 243 N. Y. 599; *Rizzuto* v. *U. S. Shipping Board Emergency Fleet Corp.*, 213 App. Div. 326.[12]

The respondent submits that here there was at least a denial of the fact of unequivocal repudiation and evidence which created an issue of fact on this question which requires a trial. The peti-

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[11] The statute states that the court "may" direct a trial. This has been construed as "must" to avoid infringement of the constitutional right of litigants in common law actions to a trial. N. Y. Constitution, Art. 1, Sec. 2; *Herzog* v. *Brown*, 217 App. Div. 402, aff'd. 243 N. Y. 599, 154 N. E. 622.

[12] See also *Barker* v. *Conley*, 267 N. Y. 43; *Mohamed* v. *Unifruitco S. S. Co.*, 223 App. Div. 791; *Perloff* v. *Kelmenson*, 226 App. Div. 696; *Galanti* v. *Brady & Gioe, Inc.*, 211 App. Div. 858; *Campbell* v. *Muncie*, 246 App. Div. 632; *Horlick* v. *Horlick*, 243 App. Div. 559.

tioner has relied to a large degree upon affidavits of its officers and employees and transactions claimed to be recorded in its books. It is submitted that the court did not have before it a case of undisputed facts in favor of the petitioner. The respondent submits that the inference required by the facts was actually in its favor.

II

No Notice of Repudiation, Binding the Soviet Government, Was Given

Even assuming that *existence* of repudiation was proved beyond a dispute requiring a trial, which the respondent denies, no *notice* of such repudiation was given to any one in a manner which binds the Soviet Government, the owner of the deposit since November 7, 1917, a date prior to the alleged repudiation. The District Court stated that evidence supported its conclusion that Bakhmeteff and Ughet were given notice of repudiation (R. 267). Assuming, *arguendo,* that in fact they were given notice of any repudiation which may have been made, and some evidence does support this conclusion, the respondent contends that the District Court erred in the conclusion of law (R. 268) that such notice was effective to start the period of limitations because it failed wholly to apply the accepted principle of retroactivity of diplomatic recognition of a foreign government. *United States* v. *Belmont,* 301 U. S. 324. The District Court erroneously relied on decisions such as *Le-*

high Valley R. Co. v. *State of Russia,* 21 F. (2d) 396 (C. C. A. 2d), certiorari denied, 275 U. S. 571 (R. 268–269) which are inapplicable because decided on the basis of non-recognition of the Soviet Government.[13]

The respondent contends: (A) Notice of repudiation to be effective must be given to an authorized representative of the Soviet Government because recognition retroactively constitutes the Soviet Government the *de jure* Russian Government and exclusive owner of the deposit on and after November 7, 1917. (B) Even if not the *de jure* Government on November 7, 1917, the Soviet Government was the *de facto* Government from that time; therefore, the Provisional Government ceased to exist and, thereafter, none of its former representatives here could act for their non-existent principal with respect to the deposit.

A. Notice of repudiation must be given to an authorized representative of the Soviet Government

Recognition retroactively validates the acts of the government recognized from the time of its inception. *United States* v. *Belmont,* 301 U. S. 324;

[13] There is no basis for the sweeping general statement by the District Court to the effect that (R. 269): "It is settled by controlling decisions, and is not denied, that the recognized diplomatic representative of the Russian state had authority to sue the bank in our courts for the recovery of the deposit now under consideration." The petitioner consistently denied that Bakhmeteff or Ughet were authorized to demand or receive this deposit, although now it relies on notice to them to begin the period of limitations.

Ricaud v. *American Metal Co.*, 246 U. S. 304; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *Underhill* v. *Hernandez*, 168 U. S. 250; *Luther* v. *Sagor* (1921), 3 K. B. 532.

Under this doctrine also, the Soviet decree of November 26, 1917, dismissing Bakhmeteff and all other diplomatic representatives averse to the Soviet Government and depriving them of any right to perform State duties or to make payments from State funds (R. 187, 217–218) is operative as of the date of its enactment.

Notice of repudiation after November 7, 1917, to be effective must be given to an authorized representative of the Soviet Government in Russia charged with the supervision of government deposits abroad and there is no record of such notice. If any notice in the United States would be effective, it would have to have been given at least to the designated representative of the Soviet Government in the United States, Mr. Ludwig Martens (R. 190, 218).[14]

B. Notice of repudiation to former representatives of the non-existent provisional government was ineffective to commence the period of limitations with respect to this deposit

Even if it could be assumed that recognition did not operate retroactively to make the Soviet Gov-

[14] Bakhmeteff certainly could not be considered as an authorized agent of the Soviet Government which he refused to recognize or consider as having any authority so far as he was concerned (R. 64).

ernment the *de jure* Government of Russia on November 7, 1917, it is clear that it became the *de facto* Government at that time. *Salimoff* v. *Standard Oil Co.*, 262 N. Y. 220; *Wulfsohn* v. *Russian Socialist Republic,* 234 N. Y. 373, dismissed for want of jurisdiction, 266 U. S. 580; Dickinson "Unrecognized Governments," 22 Michigan Law Review 118. The Provisional Government at that time ceased to exist as a principal which its former representatives could represent for purposes of receiving notice of repudiation of liability on the deposit.

It is true that, although their government, the source of their authority, had ceased to exist, our Government did not deny the diplomatic status of Bakhmeteff and Ughet as Ambassador and Financial Attaché, respectively, and on some occasions gave the usual formal official certificates concerning their status (R. 186, 246–247). They were not, however, representatives of the Soviet Government, the Russian Government after November 7, 1917. Moreover, the respondent submits that the reason for their retention, as appears from the record discussed below, supports the view that their presence here cannot be made the basis for the petitioner's contention that notice to them was effective to commence the period of limitations against the owner of the bank deposit.

Bakhmeteff and Ughet were permitted to continue to act in this country for the purpose of assisting in liquidating outstanding substantial contracts between the Russian Government and Amer-

ican manufacturers for war supplies (R. 65–66, 219–220).[15]

The United States Government, in the situation of the overthrow of the Provisional Government by the unrecognized Soviet Government, considered it important that there should be in this country a representative of the Russian interests who might be in a position to liquidate these contracts and dispose of materials in such a way that the interests of American manufacturers might be protected (R. 219–220).

Our Government was also interested in the protection of American holders, including our Government, of Russian Government obligations (R. 220).

An arrangement with these ends in view was made by our Government with Bakhmeteff and carried out by him and Ughet (R. 65–66, 107–108, 219–220).[16]

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[15] On July 5, 1917, Bakhmeteff was received by the President of the United States as Ambassador of Russia (R. 217). Ughet originally acted, under designation of January 23, 1917, as the representative of the Ministry of Finance with the Russian Supply Committee in the United States (R. 116). Bakhmeteff stated in a deposition that extensive war contracts had been made, and that the entire Russian organization in the United States, engaged in liquidating them, acted under his supervision (R. 65–66).

[16] It is to be observed that the procedure followed in France was to appoint administrators of the property in France of the former Imperial Russian Government. See *Jaudon* v. *Societe de l'Industrie Chimique*, Annual Digest of Public International Law Cases (1929–1930) No. 73.

By using the balances in the accounts in the National City Bank, upon which Bakhmeteff was expressly authorized to draw (R. 213) all of these contracts were settled. Some of them were performed in whole or in part, and others were cancelled. Material delivered under the contracts was purchased from Bakhmeteff by the United States and the Allied Governments for war purposes (R. 214–215). Cash received was placed in the accounts in the National City Bank subject to withdrawal if the Treasury of the United States made no objection. When Bakhmeteff had completed his task, he turned over the balances in the accounts to the Treasury Department to apply against interest on the indebtedness of the Russian Government to the United States (R. 214–215), and then, at the invitation of the State Department (R. 46), in a letter dated April 28, 1922, to Secretary of State Hughes, he wrote (Appendix, pp. 104):

> * * * I have remained at my post up to the present time in order to serve and protect Russian national interests and to facilitate, in cooperation with the Treasury and State Departments, the liquidation and final settlement of a large volume of commercial business for which the Government of Russia stood obligated, partly through my agency, to American business concerns. I am happy to believe that American as well as Russian interests have been served thereby.
>
> The work of liquidation has now been brought to a practical close. * * *

Bakhmeteff retired on June 30, 1922, and thereafter he had nothing whatever further to do with the conduct of Russian affairs in this country (R. 59). Pursuant to and authorized by an exchange of notes, between Bakhmeteff and Secretary Hughes, dated April 28 and 29, 1922 (Appendix pp. 103–106), Ughet continued to be considered as the custodian of Russian property in the United States for which Bakhmeteff had been responsible.[17]

On October 21, 1933, Ughet wrote to the Department of State (R. 193–194) that conditions might arise in the near future (recognition of the Soviet Government) where no further useful purpose could be served by his continued exercise of the duties with which he was vested under the exchange of

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[17] Following this exchange of notes, under which Ughet purported to act thereafter (R. 193–194), Bakhmeteff, in a letter dated June 7, 1922, to the Secretary of State, enclosed a copy of a document executed by Bakhmeteff on that date, which recited that he appointed Ughet custodian of Russian property in the United States, granting him, among others, power to commence suits when necessary in Ughet's opinion (R. 191–192). The respondent submits that any powers which Bakhmeteff may have had as Ambassador to sue after November 7, 1917, were restricted to matters of liquidation of the contracts which was the limited purpose for which our Government continued to retain him. That power, if it existed, did not extend to a demand or suit for the deposit here involved, over which Bakhmeteff had no control, as the petitioner has always maintained. Moreover, any power to bring suit, which Bakhmeteff, as Ambassador, may have retained, could not be delegated either to a custodian of Russian property or to a firm of attorneys "if at any time Russia should be without any representative," as he also attempted to do (R. 192–193).

notes between the Russian Ambassador and Secretary of State of April 28th and 29th, 1922, referred to above. Consequently, he requested that his status be discontinued. A reply from the Acting Secretary of State to Ughet dated November 16, 1933 (R. 194–195) stated that in view of the recognition of the Soviet Government, the Government of the United States ceased to recognize him as Russian Financial Attaché on November 16, 1933.

On November 16, 1933, coincident with the establishment of diplomatic relations between the United States Government and the Soviet Government, the international compact between the two governments, contained in the exchange of notes between the President of the United States and the People's Commissar for Foreign Affairs for the Soviet Government, was made (Appendix pp. 100–103). In the note dated November 16, 1933, to the President and signed by the People's Commissar, the Soviet Government, preparatory to a final settlement of the claims and counterclaims between the governments and the claims of their nationals, assigned to the United States all amounts admitted to be due or that may be found to be due the Soviet Government as successor of prior governments of Russia, or otherwise, from American nationals, the Soviet Government to be duly notified in each case of any amount realized by the United States Government from the assignment. This note further stated that the Soviet Government, preparatory to the settlement, agreed not to make any claim with respect to:

(a) judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or

(b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof.

In the absence of this international compact, the Soviet Government, after recognition, would have been entitled to sue in our courts with respect to its claims to property in the United States of former Russian Governments and Russian nationals. The fact that some of this property was used prior to recognition to settle, in whole or in part, a number of American claims, with the cooperation of the United States Government, discussed above, indicates that the purpose of these provisions of the agreement is that the Soviet Government shall not make any claims with respect to judgments or acts done and settlements made with respect to Russian property, with the approval and under the control of our Government, and to leave any further action with respect to such matters for determination by our Government. That this was the purpose of the language of the assignment quoted above is further made clear by the letter from the State Department to the At-

torney General * (Appendix, pp. 106–107), which states in part:

> By Subdivision (b) of the second paragraph of this letter the Government of the Union of Soviet Socialist Republics is understood to have agreed not to make any claim in connection with adjustments, compromises, or agreements entered into or approved by any official of the Government of the United States or any State or Subdivision thereof, relating to property, credits, or obligations of any Government of Russia or nationals thereof.

Respondent submits that these facts establish that the motive and purpose for which Bakhmeteff and Ughet were retained by our Government was the protection of the interests of American nationals in this country. Our government understood that following the fall of the Provisional Government on November 7, 1917, the successor, Soviet Government, did not recognize Bakhmeteff and Ughet as its representatives (R. 217). The authority of these representatives, derived from a Government which had ceased to exist, thereupon, in fact, ceased altogether at its source even though a continuing restricted authority, based entirely on our Government's sufferance and consent, was not denied by our Government solely for the limited and proper purpose of protecting the interests of

*This letter, not in the record, was submitted to the Circuit Court of Appeals in connection with the argument of this case.

American bondholders and American nationals in liquidating the war contracts. Such authority must be measured strictly by the urgent necessity, which was its only basis. See *Matter of People, Norske-Lloyd Ins. Co.*, 242 N. Y. 148; *Matter of People, City Equitable Insurance Co.*, 238 N. Y. 158; also *United States* v. *President and Directors of the Manhattan Company*, 276 N. Y. 396; *Matter of People, Northern Insurance Co.*, 262 N. Y. 453. It should not be made the basis for adjudication after recognition of the Soviet Government.

Even apart from the fact that they were not representatives of the Soviet Government, sole owner of the deposit, the limited authority of Bakhmeteff and Ughet affords no basis for any contention that as a matter of fact they were authorized to receive notice of repudiation or to bring suit for the Ministry of Finance account which was never subject to their control, as the petitioner always insisted, or related to or available for the special purposes, concerning which their limited authority was not denied.

The petitioner has always asserted that Bakhmeteff and Ughet had no power to withdraw this account, but in this action, it inconsistently, we think, now claims that they were authorized to sue for the deposit (Brief, p. 68) citing *State of Russia* v. *Bankers' Trust Co.*, 4 F. Supp. 417 (S. D. N. Y.) the United States substituted as plaintiff-appellant 69 F. (2d) 44, and affirmed *sub nom. United States*

v. *National City Bank of New York*, 83 F. (2d) 236 (C. C. A. 2d), certiorari denied 299 U. S. 563; *Russian Government* v. *Lehigh R. Co.*, 293 Fed. 133 and 293 Fed. 135 (S. D. N. Y.), affirmed *sub nom. Lehigh R. Co.* v. *State of Russia*, 21 F. (2d) 396, 21 F. (2d) 406 (C. C. A. 2d) certiorari denied 275 U. S. 271. See also Agency of *Canadian Car & F. Co.* v. *American Can Co.*, 253 Fed. 152 (S. D. N. Y.), affirmed 258 Fed. 363 (C. C. A. 2d).

Even apart from respondent's contention that these cases, based upon nonrecognition of the Soviet Government, can not be applied now after recognition, they are distinguished because they involved matters within the limited authority of Bakhmeteff and Ughet not denied by our Government. The *Bankers' Trust* case in the District Court merely followed the *Lehigh Valley* decision and did not consider the limited authority of Bakhmeteff or Ughet.

The *American Can* case involved two contracts for munitions made in 1915 by the Imperial Russian Government and, as Bakhmeteff testified, the Russian Supply Committee was authorized to deal with such contracts. The court held that the validity of an assignment of the Russian Government's interests in these contracts by the Supply Committee could not be questioned in order to avoid payment admitted by the defendant to be due on the contracts. In the *Lehigh Valley* case, suit to recover damages for destruction in 1916 of Russian

Government matériel in the custody of the defendant railroad had been begun by the Ambassador in 1918, before his retirement in 1922. The Circuit Court of Appeals held that the defendant could not avoid liability, which had been established on the trial, on the ground that action had abated, because Ughet had the authority and duty to continue the action. Both the *American Can* and the *Lehigh Valley* cases involved these matters which the United States wished settled.[18]

In the *Bankers Trust* case, the account was deposited with the Bankers Trust Company in 1917, in the joint name of three members of the Russian Mission of Ways of Communication. The bank agreed to the segregation of the balance in a special account in the National City Bank of New York in the name of Ughet. When Ughet demanded the money the bank refused to release it.

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[18] In the *Lehigh Valley case*, $764,554.89 out of recovery of $980,431.24 was paid by Ughet to the United States Treasurer "on account of interest due on obligations of the provisional Government of Russia held by the Treasury." Combined Annual Reports of the (U. S.) World War Foreign Debt Commission, 1922–1926, p. 87; Hudson *Cases on International Law*, p. 121 (2nd ed.).

The court adverted to the fact that delay might have given rise to the bar of limitations (21 F. (2d) 400), which in that case was a two-year period included in the bill-of-lading (293 Fed. 133). The distinction between the application of such an express contractual limitation, agreed to by the shipper, whether a sovereign or private individual, and an attempt to raise the bar of the general statute of limitation to which the sovereign has never agreed, is apparent. *United States* v. *Chesapeake & D. Canal Co.*, 206 Fed. 964, 969 (D. Del.), affirmed 250 U. S. 123.

The District Court, in an opinion dated September 18, 1933, stated that the principle of the *Lehigh Valley* case was controlling on the question of Ughet's authority to sue. After diplomatic recognition of the Soviet Government, the United States was substituted as plaintiff appellant, and the question was not involved on the appeal which was decided on the basis of the defendant's setoff.

The respondent submits that Bakhmeteff and Ughet were permitted to exercise authority because of the matters in which our Government was interested and wished settled. It is clear that our Government disapproved of the consolidation transaction (R. 201) and refused to acquiesce in it in any manner (R. 129–130). Ughet stated that he conferred with officials of the State Department in order to ascertain the wishes of the United States Government in respect to instituting an action against the petitioner for this deposit, but no definite decision was reached by the State Department as to whether a suit should then be brought (R. 177). This bank deposit was not within the scope of the matters concerning which our Government permitted Bakhmeteff and Ughet to continue to act. The provisions of the compact between the United States Government and the Soviet Government, whereby the Soviet Government agrees not to assert claims with respect to judgments or acts

done and settlements made, do not refer to matters such as this bank deposit, which is not within their intent as shown by the letter of June 1937 quoted above.

The petitioner has at all times refused to recognize either Bakhmeteff or Ughet as persons in any way authorized to deal with this deposit. In fact, the petitioner strongly maintained that the only persons authorized to deal with this account were designated officials of the Ministry of Finance. It would seem reasonable, therefore, that if the petitioner wanted to give proper notice it should have given it to persons charged with the control and supervision of this account. It may not be seriously urged that where a government is involved, engaged in multifarious State activities, notice to any employee, chosen at random or convenience, would be binding upon the government in connection with some matter, where it has designated persons specifically charged with the particular matter.

But even if it be further assumed that notice to an Ambassador is effective to begin the period of limitations, such a rule would be based on the presumption that it would be conveyed to the officials of his government charged with conduct of the matter involved. Bakhmeteff had no Government

to which he could convey notice. He could not sue without authorization from his Government. In his path stood the obstacle of the doctrine, supported by considerable authority, that an Ambassador may not sue without the express consent of his government. In *Baron Penedo* v. *Johnson*, 29 L. T. 452, the Court said:

> A minister does not represent a foreign government for the purposes of suing in this court.

In *Colombian Government* v. *Rothschild*, 1 Sim. Ch. Rep. 94, 57 Eng. Rep. 514, the Attorney General of the British Empire successfully argued that "it has been decided that an Ambassador does not represent his government in a Court of Justice." As a general rule, an ambassador may not submit himself or his nation to the jurisdiction of a foreign court without the express authorization of his government. *Dickinson* v. *Del Solar* (1930), 1 K. B. 376, 380.[19]

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[19] See also *Suarez* v. *Suarez* (1918), 1 Ch. 176; *Ex Parte Muir*, 254 U. S. 532; *Reichenbach et Cie.* v. *Mme. Ricoy* (France, Civil Trib. Seine, 4 April 1906), 34 Clunet, Jour. de droit int. privé (1907) 111; *Cottonet et Cie.* v. *Raffalowitch* (France, Civil Trib. Seine, 18 November 907), 35 Clunet, Jour. de droit int. privé (1908) 153; *Nazare Agha* v. *Galezowski* (France, Cour d'appel, Paris, 1912), 39 Clunet, Jour. de droit int. privé (1907) 1133; Pradier-Fodéré, *Cours de droit diplomatique* (2d ed. 1899), vol. 2, p. 152;

III

Even if notice of repudiation had been given to the Soviet Government the statute of limitations did not begin to operate because that government was prevented from suing in our courts

The Soviet Government has on at least four occasions tried to protect its rights and interests in Courts of the United States, either directly or by agents, and in each instance was met with the refusal of the court to entertain the action on the ground that an unrecognized government could not resort to our courts. *R. S. F. S. R.* v. *Cibrario,* 235 N. Y. 255; *Preobazhenski* v. *Cibrario,* 192 N. Y. Supp. 275; *The Penza,* 277 Fed. 91 (E. D. N. Y.); *The Rogdai,* 278 Fed. 294 (N. D. Cal.).

It is an established rule of law that the statute will not operate against a plaintiff who has no forum in which to assert its rights. *Oswego & Syracuse R. R. Co.* v. *State,* 226 N. Y. 351, 360, 362; *Cayuga County* v. *State,* 153 N. Y. 279, 291; *Parmenter* v. *State,* 135 N. Y. 154, 163. In addition to statutory exceptions to the operation of the statute

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Instructions to Diplomatic Officers of the United States (1897), Sec. 46, p. 18; *Instructions to Diplomatic Officers of the United States* (1927), Ch. VII, Sec. 1; Ogdon, *Juridical Bases of Diplomatic Immunity* (1936), 133 ff.; Fauchille, *Traité de droit international public* (8th ed. 1926), Tome 1, 3ème partie, p. 69; Morton, *Les priviléges et immunités diplomatiques* (1927), 147; there is a collection of material in the Harvard Law School Research in International Law, *Diplomatic Privileges and Immunities* (1932), Special Supplement 26 American Journal of Int. Law (1932), 124 ff.

of limitations (e. g. New York Civil Practice Act § 24) there exist other exceptions, based largely upon the doctrine of "invincible necessity" as the factor compelling an exemption from the operation of the statute. *McIver* v. *Ragan*, 2 Wheat. 25, 29; *Braun* v. *Sauerwein*, 10 Wall. 218, 223; *United States* v. *Wiley*, 11 Wall. 508, 513; *Hanger* v. *Abbott*, 6 Wall. 532, 540–542; *Amy* v. *Watertown*, No. 2, 130 U. S. 320, 325; *Brenner* v. *Quick*, 88 Ind. 546, 555. Among these exceptions are those applied where there is no person in existence qualified to institute process. *Hobart* v. *Connecticut Turnpike Co.*, 15 Conn. 145, 149; *Baker* v. *Barclift*, 76 Ala. 414, 417; *Sorrels, Adm'r* v. *Trantham, Adm'r*, 48 Ark. 386, 390. A cause of action accrues when there is a demand capable of present enforcement. *Jacobus* v. *Colgate*, 217 N. Y. 235. When such present enforcement is prevented by a superior power without default on the part of the creditor, none of the reasons which induced the enactment of the statute of limitations applies. Wood, *Limitations*, p. 17 (4th Ed.).

Any statute of limitation which, in its operation, fails to afford an aggrieved person a full opportunity to enforce his right before his remedy becomes barred imposes an unreasonable limitation forbidden by the Constitution of the United States (*Wilson* v. *Iseminger*, 185 U. S. 55, 62–63; *Keskonong* v. *Burton*, 104 U. S. 668, 675; *Terry* v. *Anderson*, 95 U. S. 628; *Christmas* v. *Russell*, 5 Wall. 290, 300; *Jackson* v. *Lamphire*, 3 Pet. 280, 289;

Lamb v. *Powder River Live Stock Co.*, 132 Fed. 434 (C. C. A. 8th); *Jacobus* v. *Colgate, supra*), and such a construction is to be avoided.

In view of these rules the respondent submits that the statute of limitations could not and did not operate against the Soviet Government during the entire period of its disability to enforce its rights in our courts.

Part Two

Foreign sovereigns are not bound by state statutes of limitations

Assuming, for the argument of Part Two of this brief that, under the facts of this case, the New York statute of limitations would have run if a private person owned the bank deposit, and that the United States is in no better position than the Soviet Government, the respondent contends that the statute cannot be applied against a foreign sovereign.

The court below correctly, we submit, held (R. 284):

> * * * To declare that the principle [of sovereign immunity from state limitations] is applicable to the United States but not to a foreign sovereign is to accord to the latter less than full sovereign rights. Whether a foreign government shall be accorded less than full sovereign rights in the United States is a matter pertaining to international relations over which the national government has complete control. * * *

The respondent contends (I) that as a matter of federal procedure, a state statute of limitations is not applicable to a law action in the federal courts by a foreign sovereign; (II) that the state statute is not intended to apply to foreign sovereigns which it does not expressly include; and, (III) that the court below correctly held that a state cannot bind foreign sovereigns by its statutes of limitations.

I

Under the Federal Rules of Decision Act the New York statute of limitations is not applicable to a law action by a foreign sovereign in a federal court

Even assuming that the New York statute of limitations could validly apply in suits by foreign sovereigns in state courts, and even assuming that the United States is in no better position than the foreign sovereign in this action, it cannot apply because this is not a case where state laws apply within the meaning of the Rules of Decision Act (R. S. Sec. 721, U. S. Code, Title 28, Section 725). *United States* v. *Thompson,* 98 U. S. 486; *U. S.* v. *Hoar,* 2 Mason 311, 26 Fed. Cas., No. 15,373 (C. C. Mass.)[20]

In *United States* v. *Thompson, supra,* this Court held that the Minnesota six year state statute of

[20] This point and the similar point, *infra*, p. 83, was not raised in or considered by the courts below but is advanced as an additional reason for the correctness of the result reached by the Circuit Court of Appeals in not applying the state statute of limitations. See *Helvering* v. *Gowran,* 302 U. S. 238, 245.

limitations, which expressly applied to the State, as in the instant case, would not be presumed to and could not apply to the United States. The argument was made that the Rules of Decision Act gives the same efficacy to state statutes of limitations in the federal courts that they have *proprio vigore* in the State courts, and that, therefore, Congress intended that a State statute of limitations which applied to the sovereign, the State, in the state courts, should apply to the sovereign, the United States, in the Federal courts. This Court, rejecting the argument, stated at page 490:

> The United States not being named in the statute of Minnesota, are not within its provisions. It does not and cannot "apply" to them. If it did, it would be beyond the power of the State to pass it, a gross usurpation, and void. It is not to be presumed that such was the intention of the State legislature in passing the act, as it certainly was not of Congress in enacting the law of 1789. *United States* v. *Hoar, supra; Field* v. *United States,* 9 Pet. 182.
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> * * * * *
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> The exemption of the United States from suits, except as they themselves may provide, rests upon the same foundation as the rule of *nullum tempus* with respect to them. If the States can pass statutes of limitation binding upon the Federal government, they can by like means make it suable within their respective jurisdictions. The evils of such a state of things are too obvious to require remark.

> But viewing the subject in the light of considerations *ab inconvenienti,* we need not look beyond the consequences of the ruling, if sustained, of the court below. The doctrine is alike applicable to civil and criminal actions. There are thirty-eight States in the Union. The limitations in like cases may be different in each State, and they may be changed at pleasure, from time to time. The government of the Union would in this respect be at the mercy of the States. How that mercy would in many cases be exercised is not difficult to foresee. The constitutional relations of the head and the members would be reversed, and confusion and other serious evils would not fail to ensue.

The view of this Court that if States can subject the United States to state statute of limitations, they can make the United States suable in their court, applies equally to foreign sovereigns, because States cannot make foreign sovereigns suable in their courts. Also the considerations *ab inconvenienti* apply equally to foreign sovereigns. The respondent submits, therefore, that the Rules of Decision Act does not authorize application of a state statute of limitations in a law action in the federal courts by a foreign sovereign.

In *United States* v. *Hoar, supra,* the Court, in an opinion by Mr. Justice Story, held that Congress did not intend in the Rules of Decision Act that the Massachusetts statute of limitation should bind the United States in law actions in the federal courts

and stated that to permit the statute of limitations to apply to the United States would be to subject "public rights, revenue, and property * * * to the arbitrary limitations of the states; and the limitations are so various in these states that the government would hold their rights by a very different tenure in each."

In view of the fact that foreign relations always have been a matter of exclusive national concern (*United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304) and that States are prohibited from acting in this field even in the absence of positive federal action (*United States* v. *Rauscher*, 119 U. S. 407, 412–414; *Henderson, et al.*, v. *Mayor of New York, et al.*, 92 U. S. 259, 271–272), it is submitted that Congress did not intend in the Rules of Decision Act that foreign sovereign suing in federal courts should be subject to the various limitations of the States.

II

A state general statute of limitations does not bind a foreign sovereign; particularly, the New York statute does not bind the Soviet Government

The petitioner devotes the greater part of its brief (Part I, pp. 13–71) to the proposition that the New York state statute of limitations binds foreign sovereigns, and that at the time the claim here was assigned to the United States it was barred by this general period of limitations.

Assuming for this part of the argument that the New York statute would bar a private person who made the deposit, under the facts of the case, and that the United States is in no better position than the Soviet Government, the respondent contends (A) that the New York statute which does not name foreign sovereigns does not intend to bind them; and (B) that a State of the United States lacks power to bind foreign sovereigns by limitations.

A. The New York statute of limitations is not intended to apply to foreign sovereigns

The respondent contends that the complete lack of any intention to bind foreign sovereigns by the general language of the New York statute of limitations is shown by (1) the language of the statute which does not expressly include foreign sovereigns; (2) the reason for the sovereign exemption, applicable alike to the local and domestic sovereigns; (3) the rule of international law that sovereign claims are not subject to local statutes of limitations; (4) the rule of the law of nations that sovereigns are immune from suit; and (5) the lack of power to enact such legislation.

1. The terms of the statute do not include foreign sovereigns

The New York statute of limitations is contained in the Civil Practice Act, Art. II, "Limitations of Time," Sections 10–61. Section 15 provides that the time within which an action must be commenced

for a deposit of money, not to be repaid at a fixed time but only upon a special demand, must be computed from the demand. Section 48 provides that an action upon a contract obligation must be commenced within six years after the cause of action has accrued. Section 54 provides that the limitations prescribed in Article II for actions other than for the recovery of real property apply alike to actions by private persons and to actions in the name of the people of the state or in their behalf.

Section 977–b, Subsection 18, provides in part that the time between the nationalization of a foreign corporation and the appointment of a receiver of its property in New York, plus three years, shall not be part of the time limited for commencing an action by or against such a corporation, whether or not the action has already been barred. This section applies to nationalized former Russian corporations. *United States* v. *Belmont,* 85 F. (2d) 542 (C. C. A. 2d), reversed 301 U. S. 324. Non-recognition of the Soviet Government from 1917 to 1933 was a cause of the enactment of this statute, and, apparently, the New York legislature was motivated by the consideration that the normal statute of limitations was inappropriate for this abnormal situation. The respondent submits that the statute of limitations should not be construed to give the Soviet Government a lesser remedy as successor to prior Governments than as successor to its nationalized corporations.

It has always been the law in England and the United States, as a canon of statutory construction, that a statute of limitations does not bind the local sovereign unless the statute expressly so provides. *Dupont de Nemours & Co.* v. *Davis*, 264 U. S. 456, 462; *Administrator of Hungarian Property* v. *Finegold*, 144 L. T. 670 (C. A. 1931); Bracton, De Legibus Liber, II c. 5, Sec. 7. This has always been the rule expressed in state courts including New York. *People* v. *Gilbert*, 18 Johnson 227 (N. Y. 1820); *Stoughton* v. *Baker*, 4 Mass. 521 (1808).

Under our constitutional system of dual sovereignty the same rule of construction is applied, and a state statute will not be construed to bind the United States. *United States* v. *Thompson*, 98 U. S. 486.

In *United States* v. *Hoar*, 2 Mason 311, 314, 26 Fed. Cas., 329, No. 15, 373 (C. C., Mass.), a leading case reviewing the early English authorities, Mr. Justice Story stated the rule of this sovereign exemption, expressed in the maxim *nullum tempus occurrit regi*, as follows:

> But, independently of any doctrine founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, founded upon the legislative intention. Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the lan-

> guage used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary force to the government itself. It appears to me, therefore, to be a safe rule founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act.

Recently this Court stated, citing the *Hoar* case, that the rule exempting the sovereign from general limitations is "a classical instance" of the canon of statutory construction that the general words of the statute do not include the Government or affect its rights unless the construction be clear and indisputable upon the text of the statute. *Nardone et al.* v. *United States,* No. 190, Present Term, decided December 20, 1937, Pamp., pp. 3–4. The basis of this rule of construction is the view that sovereign interests should not be defeated or limited by the general words of the statute which do not disclose such an intention. *Dollar Savings Bank* v. *United States,* 19 Wall. 227, 239.

In view of this unquestioned rule of construction, it was necessary to mention the people of the State of New York in the statute by express terms in order to include the State. Other sovereigns not named, the United States or foreign sovereigns, are not included. This conclusion is supported also by the familiar rule of construction that inclusion of one of a class in a statute excludes other members of the same class not named.

No intent to include foreign sovereigns can be inferred from any of the words of the statute. And certainly it may be assumed that no positive intent to include foreign sovereigns accompanied enactment of this statute.

The question of inclusion of foreign sovereigns in the New York statute has not been discussed by the state courts of New York. In the absence of state court decisions a construction of the statute should not be adopted which is not required by its terms and which defeats sovereign rights. This is especially true in the present case when such a construction would at least raise a doubt of the validity of the State statute so construed (pp. 77–82, *infra*).

2. The reason for the rule applies equally to domestic and foreign sovereigns

a. *Reason for the Rule.*—The basis of this rule of construction exempting sovereigns from general statutes is the view that the legislature does not intend to defeat or diminish the sovereign's inter-

ests by the general words of the statute disclosing no such intention. *Dollar Savings Bank* v. *United States,* 19 Wall. 227, 239; *United States* v. *Hoar, supra.* Examination of the development of the rule of exemption of the sovereign from limitations, apart from the general rule of the exemption of the sovereign from all general statutory provisions, discloses that the rule, at first expressed as a protection of royal prerogative and public rights (Bracton, *supra*) was later stated to be in itself a royal prerogative. *Magdalen College Case,* 11 Co. Rep. 66b, 74b (1616); *Sir William Candish's Case,* 1 Plowden 321 (1567). For a time the basis of the rule was said to be the presumption that the King, being daily employed in public affairs, lacked full opportunity to enforce his rights and should not be barred by delay. Bacon's Abridgment, Prerogative, E 6 (1736); Blackstone's Commentaries, Vol. I, p. 247 (Cooley 4th Ed.).

In *United States* v. *Hoar, supra,* Mr. Justice Story reviewed some of the earlier authorities and stated the rule as follows (2 Mason, 311, 314; 26 Fed. Cas. p. 330):

> * * * The true reason, indeed, why the law has determined, that there can be no negligence or laches imputed to the crown, and, therefore, no delay should bar its right, though sometimes asserted to be, because the king is always busied for the public good,

and, therefore, has not leisure to assert his right within the times limited to subjects (1 Bl. Comm. 247), is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation, or exception, introduced for the public benefit, and equally applicable to all governments. We find accordingly, in our own state, the doctrine is well settled, that no laches can be imputed to the government, and against it no time runs, so as to bar its rights (*Inhabitants of Stoughton* v. *Baker,* 4 Mass. 528); so, that it is clear, that the statutes of limitations pleaded in this case would be no bar to a suit brought to enforce any right of the state in its own courts.

But, independently of any doctrine founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, founded upon the legislative intention. Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very differ-

ent, and often contrary force to the government itself. It appears to me, therefore, to be a safe rule founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act.

This Court has repeatedly stated that the modern basis of the rule of exemption from limitations which gives it vitality at present, is the public policy that public rights and interests shall not be lost or diminished by the failure of public officials to assert them properly. *French Republic* v. *Saratoga Vichy Spring Co.*, 191 U. S. 427; *United States* v. *Nashville etc. R. Co.*, 118 U. S. 120, 125; *Fink* v. *O'Neill*, 106 U. S. 172, 281; *United States* v. *Thompson*, 98 U. S. 486, 489; *United States* v. *Knight*, 14 Pet. 301, 315; *United States* v. *Kirkpatrick* 9 Wheat. 720, 735.

b. *The reason for sovereign exemption applies equally to local and foreign sovereigns.*—The public policy which is the basis of the rule of exemption is "applicable to all governments alike." *United States* v. *Nashville Etc. R. Co.*, 118 U. S. 120, 125; *Gibson* v. *Chouteau*, 13 Wall. 92. It is plain that all governments are so conducted that such a policy is most useful and necessary in the protection of public rights. It is evident also that this public policy is applicable to public rights to be enforced in foreign as well as domestic courts.

The court below stated in its opinion that "In *United States* v. *Nashville R. Co.* 118 U. S. 120, 125, there is a dictum that the principle of public policy which forbids that the public interest should be prejudiced by the negligence of the officers or agents to whose care they are confided is 'applicable to all governments alike.' "

The petitioner contends (Brief, pp. 28–32) that the court below was influenced by the misinterpretation of this dictum. The respondent submits that the lower court's opinion by Judge Swan indicates that the dictum was used in the sense that it is used here, namely that governments are so conducted that the reason for the sovereign exemption is applicable to them all alike.

It is apparent, at least, then that a sovereign which has a policy that limitations shall not bind it in suits in its own courts equally desires that it shall not be barred in suits in foreign courts. Practically, the only manner in which the latter policy can be achieved is by the uniform rule that sovereigns whether domestic or foreign are not bound by general statutes of limitations.

The rule recognizes that public rights often may not be enforced promptly and are much too important to be barred by general limitations which are framed with respect to private rights. Certainly these considerations apply to the governmental activities of foreign sovereigns as well as local sovereigns and the same rule should apply.

Furthermore, to hold that a foreign sovereign is subject to operation of state statutes of limitations would be to hold it bound by scores of varying statutes of limitations of the States of the United States which for a contract of this nature range from three to fifteen years.[21] The confusion which would result from such a rule in the field of our foreign relations is manifest. National interests would require that in this respect there should be uniformity.[22] The mischief of a contrary rule would be very great (*United States* v. *Hoar*, 2 Mason 311, 315), and it is for that reason, among others, that our courts have held that as to foreign sovereigns the States as such do not exist.[23]

The respondent submits that this rule of convenience requires the exemption of a foreign sovereign from the operation of State local statutes of limitations.

3. The rule of international law that sovereigns are not bound by general statutory limitations of municipal law in international tribunals supports the conclusion that the New York statute was not intended to include foreign sovereigns

In international law and practice concerning the adjudication of claims between sovereigns on be-

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[21] Mix, State Statutes of Limitations, 3 Rocky Mountain L. R. 106, 118–129. A schedule of these various statutes of limitations appears in the Appendix at page 98 below.

[22] *Buckner* v. *Finley*, 2 Pet. 586, 590; *The Lottawanna*, 21 Wall. 558, 575; *Henderson* v. *Mayor of N. Y.*, 92 U. S. 259, 273; *United States* v. *Thompson*, 98 U. S., 486, 491; *Workman* v. *New York City, Mayor*, 179 U. S. 552, 558.

[23] *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304; *People ex rel. Barlow* v. *Curtis*, 50 N. Y. 321, 326.

half of themselves and their nationals, the municipal statutes of limitations of the sovereigns involved do not apply. *The Pious Fund of the Californians,* Foreign Relations of the United States (1902), Appendix II, p. 63; *Collac* v. *The Yugoslav State,* Annual Digest of Public International Law Cases, pp. 196, 197 (1929–1930); *Sarropoulos* v. *Etat Bulgare,* Annual Digest, p. 263 (1927–1928); *George W. Cook No. 2,* Annual Digest, p. 264 (1927–1928); *The Spader Case,* Venezuela Arbitration Commission, p. 161 (1903); *The Gentinni Case,* Venezuela Arbitration Commission, p. 720 (1903); Case of King and Gracie, U. S.—Gt. Britain Comm. (1853–1855) p. 305; *The Mossman Case,* 4 Moore, Int. Arb., p. 4180; *The Williams Case,* 4 Moore, Int. Arb., p. 4181.[24]

In the *Pious Fund* case, decided by the Permanent Court of Arbitration and in the *George W. Cook* case decided by the United States-Mexico General Claims Commission it was asserted by Mexico that the claims were barred by the Mexican statute of limitations. In each case the respective tribunal rejected the applicability of municipal statutes of limitations to international claims.

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[24] See also Borchard, *Diplomatic Protection of Citizens Abroad,* p. 829; Ralston, *Supplement to the Law and Procedure of International Tribunals,* p. 185 (1936); Lauterpacht, *Private Law Sources and Analysis of International Law,* pp. 118–119 (1927); Pomeroy, *Lectures on International Law,* Sec. 111, pp. 125–127; Kluber, *Droit de Gens,* Sec. 125; Martens, *Droit de Gens,* Secs. 70, 71.

The attitude of the United States in this respect is particularly well stated in a communication written in 1849 by the Secretary of State of the United States in a dispute concerning claims by American citizens against the government of Ecuador. To the objection that these claims were barred by the Ecuador statute of limitations he wrote:

> This Government can never allow any claims of our citizens which it may think proper to present to another government, to be rejected on account of a municipal law of the foreign government like that in question * * * It is essential to the dignity of the state that it should consult its own convenience in preferring complaints of this character * * * An acquiescence by us in the position assumed, would subject us to the imputation of sacrificing the rights of our injured citizens to a mistaken forbearance towards their aggressors. If, therefore, the law referred to should again be mentioned as an impediment to the adjustment of the claims, you will, in a firm, decided yet respectful manner, declare that it can never be acknowledged as such by this government. Moore's Digest of International Law, Vol. 6, p. 1002.

The inapplicability of any statute of limitations to sovereigns, however, does not create the danger of the enforcement of stale claims because international law applies a clear rule of laches to sovereign claims. *Maryland* v. *West Virginia*, 217

U. S. 22; *Barbarie* v. *Venezuela,* 4 Moore, Int. Arb., p. 4199; Borchard, *Diplomatic Protection of Citizens Abroad,* p. 830; Moore's Digest of International Law, Vol. 1, Sec. 88.[25]

The complexity and delicacy of international relations, which may often cause an excusable delay in the presentation of government claims, makes it evident that the flexible rule of laches, which considers the special facts of each case, supplies the proper equitable limitation of time for the presentation of government claims. Local general statutes providing short periods meant to govern private commercial transactions are wholly inapplicable.

The instant case serves as a good example of a situation in which the doctrine of laches and not a local six-year statute of limitations provides the only fair and equitable limitation on the sovereign's claim. During the period of non-recognition of the Soviet Government it was not permitted to sue in our courts. All parties interested in the bank deposit were in doubt concerning the manner in which it should be treated in the absence of recognition. Certainly the local statute of limitations was not intended to apply to such a situation.

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[25] No laches are or could be urged here. The Soviet Government before diplomatic recognition was barred from suit in our courts, and upon recognition on November 16, 1933, assigned this claim to the United States. Thereafter this suit was commenced on September 21, 1934.

The respondent submits that the rule of international law, in force when the New York statute of limitations was enacted, that government claims in international tribunals are not subject to local limitations, supports the view that the New York legislature did not intend by the general terms of its statute of limitations to include this claim of a foreign sovereign.

4. The rule that sovereigns are immune from suit requires the interpretation that the New York statute of limitations does not intend to include foreign sovereigns

The respondent contends that New York, lacking the status of a sovereign with respect to foreign sovereigns, has no power to subject a foreign sovereign to its statute of limitations (pp. 78–82, *infra*). The respondent also contends that because of this lack of power the state statute should not be presumed or construed to have attempted to bar foreign sovereigns (p. 78, *infra*). But even if New York were a complete sovereign, with the same power to subject a foreign sovereign within its territory to the jurisdiction of its courts that is possessed by the United States, the New York statute should not be so construed because it is not to be thought that the Legislature intended in this manner to modify the rule of the law of nations that sovereigns and their property are immune from suit.

It is a cardinal rule of international law that the person and property of a foreign sovereign are immune from suit, without its consent, in the courts of all nations. *Berrizzi Bros.* v. *S. S. Pesaro.*

271 U. S. 562; *The Exchange,* 7 Cranch 116; *The Parlement Belge,* L. R. 5 P. D. 197 (C. A. 1878).

The states of the Union, including New York, have never questioned this rule. *Briggs* v. *The Light-Ships,* 22 Allen (Mass.) 157; *People* v. *Dennison,* 84 N. Y. 272, 281; *Hassard* v. *United States of Mexico,* 29 Misc. (N. Y.) 511; *Manning* v. *Nicaragua,* 14 Howard's Practice 517. The respondent submits that an examination of the basis and development of this rule of sovereign immunity from suit, and the recognized related immunities from judgment or execution even when the sovereign sues makes it clear that an inseparable part of the immunity from suit is an immunity from statutes of limitations.

In the leading case *The Exchange,* 7 Cranch 116, Chief Justice Marshall explained the basis of the immunity of a foreign sovereign and its property from the jurisdiction of our courts. That case tested the rule under trying circumstances because the facts pleaded in the libel, to recover the vessel, were that the vessel of the libellants, American citizens, was unlawfully seized and converted into a public vessel of war of a friendly foreign sovereign, by Napoleon, Emperor of the French, without sentence or decree of condemnation by a court. Upon a suggestion filed by the United States Attorney, at the instance of the executive department of the United States Government, the District Court dismissed the libel on the ground that a public armed

vessel of a friendly foreign sovereign is not subject to the ordinary judicial tribunals of the country. The Circuit Court reversed, but the Supreme Court affirmed, the sentence of the District Court.

The unanimous opinion of this Court, delivered by Chief Justice Marshall, explained the immunity by the following reasoning: A sovereign's exclusive and absolute jurisdiction within its own territory, even with respect to suits against foreign sovereigns, is, of course, subject only to the limitations imposed by itself. All sovereigns, however, suable in their own courts only by their consent and possessing equal rights and equal independence, have consented for their mutual advantage to an exception to their absolute jurisdiction over each other in their respective territories. The exception, in which the whole world has concurred, is based on the fact that a foreign nation is not understood as intending to subject itself to another jurisdiction which would be incompatible with its dignity and its independence from any superior authority. There exists, therefore, a consent by every sovereign to this immunity of sister sovereigns, either expressed or implied, and the extent of this consent is to be tested by the common usage of nations. The Chief Justice remarked at p. 137:

> A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not con-

> summate to the usages and received obligations of the civilized world.

And at p. 146:

> Without doubt, the sovereign of the place is capable of destroying this implication [of consent to immunity]. He may claim and exercise jurisdiction, either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise.

The leading English case, *The Parlement Belge*, L. R. 5 P. D. 197 (C. A. 1878), involved an admiralty proceeding *in rem* on behalf of owners of a vessel to recover redress for a collision with the Parlement Belge, an unarmed packet belonging to the King of Belgium and employed in carrying mail and also merchandise and passengers for hire between Dover and Ostend. The Court of Appeals reversed a judgment of the Admiralty Division which had overruled a protest by the Attorney General that the court had no jurisdiction and had ordered a warrant of arrest to issue.

Lord Justice Brett, delivering the opinion of the Court of Appeal, remarked that the first case to be considered on the question was, and always would be, *The Exchange, supra,* and he quoted from the opinion of this Court in that case at length and with

approval. He stated that the question whether the vessel was exempt from jurisdiction depended upon whether all nations have agreed it shall be, or in other words, whether it is so by the law of nations, which depends upon universal implied agreement. The opinion states, at p. 207:

> from all these authorities it seems to us, although other reasons have sometimes been suggested, that the real principle on which the exemption of every sovereign from the jurisdiction of every Court has been deduced is that the exercise of such jurisdiction would be incompatible with his regal dignity—that is to say, with his absolute independence of every superior authority.

Rejecting an attempted distinction between jurisdiction over the person and jurisdiction over the property of the foreign sovereign, and speaking of the latter type of attempted jurisdiction the Court stated at p. 219:

> To implead an independent sovereign in such a way is to call upon him to sacrifice either his property or his independence. To place him in that position is a breach of the principle upon which his immunity from jurisdiction rests. We think that he cannot be so indirectly impleaded, any more than he could be directly impleaded. The case is, upon this consideration of it, brought within the general rule that a sovereign authority cannot be personally impleaded in any court.

The respondent submits that to place the foreign sovereign in the position of being compelled to sue

in the New York courts or sacrificing his remedy there is, through the bar of limitations, a breach of the principle upon which its immunity rests.

As a consequence of this basic immunity from suit, foreign sovereigns, even when they voluntarily sue, have been held immune from interpleader or affirmative judgment on counterclaim without consent (*Kingdom of Roumania* v. *Guaranty Trust Co.*, 250 Fed. 341 (C. C. A. 2nd) *Hassard* v. *United States of Mexico, supra,* and immunity from execution of judgment even in an action in which the sovereign has consented to be sued. *Dexter & Carpenter* v. *Kunglig Jarnvagsstyrelsen,* 43 F. (2d) 705 (C. C. A. 2nd).

The respondent submits that this Court already has stated that the immunity from suit and the immunity from statutes of limitations are attributes of sovereignty which rest on the same basis. *United States* v. *Thompson,* 98 U. S. 486. In that case, holding that the Minnesota six-year statutory period of limitations for contract actions, which expressly included the State but not the United States, did not and could not bind the United States, this Court stated, that it "is not to be presumed that such was the intention of the State legislature in passing the act * * *. If the States can pass statutes of limitations binding upon the Federal government, they can by like means make it suable within their respective jurisdictions." The respondent submits that it is not to be presumed that it was the intention of the New York

legislature to bind foreign sovereigns and to that extent violate the rule of the law of nations that sovereigns are immune from suit. Municipal laws will not be construed to violate international law. *The Charming Betsy,* 2 Cranch 64.

The instances relied upon by petitioner in which foreign sovereigns are subjected to processes of the courts in which they pursue their rights (Brief, pp. 40–44) are distinguishable upon the general ground that when a foreign sovereign comes into the courts of another State, there is no loss of dignity in its subjecting itself to the ordinary routine procedural rules designed to *facilitate* its enforcement of its rights. Essentially, the foreign sovereign agrees to abide by such rules because they are designed to secure an examination of its claims upon the merits. This cannot and does not mean, however, that in coming into the courts of another State, the sovereign waives its immunity from affirmative action designed to defeat its rights before they are examined upon the merits.

To show the applicability of the local rule of limitations to the foreign sovereigns, the petitioner discusses (Brief, pp. 23–27) four cases decided in American courts. The respondent submits that none of these cases touches the problem now before this Court. In *Western Lunatic Asylum* v. *Miller,* 29 W. Va. 326 (1887), the Court stated that the plaintiff, a public corporation of Virginia, was subject to the same limitations as a natural person,

and then stated that conceding the plaintiff and the Commonwealth of Virginia were one, the local limitation barred Virginia. It is to be noted that West Virginia had a statute of limitations binding the local sovereign. This case, we submit, does not apply to the wholly different question involved here of the application of a local statute of limitations which does not bind the United States to a claim obtained by the United States by assignment from a foreign sovereign. The petitioner, itself, admits (Brief p. 48) that the States of the Union are not nations either as among themselves or in respect of foreign nations, citing *New Hampshire* v. *Louisiana,* 108 U. S. 76, 90.

In *Commissioners of the Sinking Fund of Louisville* v. *Buckner,* 48 Fed. 533 (C. C. Ky. 1891), the Court had before it the question of limitations as applied in connection with a special tax statute. It held no more than that a two-year limitation on suits against collectors to recover Federal taxes applied to a municipality, because the remedy was indirectly against the United States and the statute providing the conditions on which the United States consented to suit must be complied with in every respect, by every one. The reference by the Court to the operation of the statute of limitations against a foreign State is bare dictum, utterly unsupported by authority.

In *United States* v. *Brown,* 247 N. Y., 211 (1928), the Court held that the United States was not bound

by the local statutes of limitations, and remarked "nor is it a case where another State or foreign government comes to us for relief." That language is a dictum and not a ruling in support of the petitioner and, in so far as it places another State and a foreign sovereign in the same category, it is not in accord with the principles stated by this Court in *United States* v. *Belmont*, 301 U. S. 324.

In *Royal Italian Government* v. *International Committee of Y. M. C. A.*, 273 N. Y. 468, the record reveals that the questions as to the operation of the statute of limitations against the foreign sovereign plaintiff was presented for the first time on a motion for re-argument in the Appellate Division of the Supreme Court of New York after its decision and was not before that Court when it made its judgment later affirmed by the Court of Appeals without opinion.

It is submitted, therefore, that none of the American cases on which the petitioner relies is in any way authority for its contention that a foreign sovereign is bound by a state statute of limitations.

The petitioner urges (Brief, pp. 45–51) that the statute of limitations has long been recognized as a meritorious defense. There is no dispute with this contention. However, in its application and enforcement, the statute of limitations must be confined, we submit, to those standard instances where the "reasons which induced the enactment of these statutes" are present. The statute of limitations is not such a meritorious defense that either the

law or the facts should be strained in its aid. *Bowman* v. *Colfax*, 17 Wash. 344, 347.[26]

The petitioner also strongly relies (Brief p. 27) in support of its statement that to hold the foreign sovereign bound by local limitations is "in accord with the universal practice abroad," upon *Gouvernement espagnol* v. *Veuve et Heritiers d'Aguado*, Paris Court of Appeal (1867) Dalloz, 1867, II, 49. In that case, the Spanish Government instituted an action for an accounting thirty-seven years after its cause of action accrued. The lower court (Civil Tribunal of the Seine) dismissed the action and on appeal to the intermediate court (Paris Court of Appeal) the judgment was affirmed. Both courts applied the French statute of limitations which, it is to be noted, was a *national* statute and not one of a local political subdivision. On appeal to the French Court of Cassation (not referred to in petitioner's brief) the plaintiff for the *first* time maintained the position that the French law governing limitations was not applicable against it. The Court of Cassation held (Journal du Palais, 1869, p. 118) that the plaintiff, the Spanish

[26] See also *Senninger* v. *Rowley*, 138 Iowa 617; *Wooster* v. *Scorse*, 16 Ariz. 11. In *Billings* v. *Hall*, 7 Calif. 1, the court states (p. 4):

"* * * It would be inconsistent with sound morality and wise legislation to suppose that it was ever intended, that when a party gave his obligation to pay a particular debt, he was presumed to have in his mind a particular period of time, beyond which, if he protracted his obligation, his liability would cease * * *."

Government, would not be heard to assert this contention for the first time before the highest Appellate Court.

The respondent submits that this ruling of the French Court of Cassation completely disposes any applicability the *Aguado* case may be claimed to have to the instant case.

The petitioner appends to its brief (pp. 96–116) a number of Code provisions and some decisions of various foreign courts. It is to be noted that practically all of the statutory provisions relate to the application of "prescription." It is impossible, without the presentation and examination of the interpretative law in each State to ascertain whether "prescription" includes both acquisitive and extinctive prescription, and whether there is any basis for drawing the conclusion which the petitioner attempts to draw that even if the local sovereign chooses to make a rule of limitation applicable to itself, it would hold a foreign sovereign coming into its court bound by that rule. Certainly it does not appear that a foreign sovereign would not be accorded the privileges and immunities of the local sovereign which is all respondent contends for here. For that reason, the respondent submits that these statutory provisions are wholly irrelevant to the precise question presented to this Court in this case.

Particularly, the petitioner is not justified in stating, as it does (Brief, pp. 18, 112–114) that the statute of limitations of the Soviet Government

binds the local sovereign and would bind a foreign sovereign suing in its courts. An analysis of the Soviet law (Appendix, pp. 108–118) shows definitely that in a suit by the State to recover State property or to protect and enforce public rights, the statute of limitations does not bar the State.

The petitioner states (Brief, p. 4) that the deposit was an ordinary commercial transaction. In fact, the deposit was part of the proceeds of a public loan and constituted public property of a foreign sovereign in the United States. *Berrizzi Bros.* v. *S. S. Pesaro,* 271 U. S. 562; *Kingdom of Roumania* v. *Guaranty Trust Co.,* 250 Fed. 341 (C. C. A. 2d).

The law is well settled that such public property enjoys full immunity. *Stockwell* v. *Bates,* 10 Abb. Pr. (N. S.) (N. Y.) 331; *Leavitt* v. *Dabney,* 37 How. Pr. (N. Y.) 264; *v. Hellfeld* g. *den Fiskus des russischen Reiches* (Germany, 1910), 5 A. J. I. L. 490.

5. Lack of power of New York to bind foreign sovereigns by its statute of limitations requires construction that such a result was not intended

New York lacks power to bind foreign sovereigns by its statutes of limitations (*infra,* pp. 78–82). Even a serious doubt concerning that power requires a construction that the statute, which does not include foreign sovereigns expressly, does not intend to include foreign sovereigns. *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375.

B. The State lacks power to bind a foreign sovereign by a statute of limitations

Even apart from the international compact here involved (Part Four, *infra*, pp. 90–97) if the New York statute of limitations is construed to include foreign sovereigns it is invalid, because to that extent it invades the exclusive federal field of the foreign relations of the United States. This conclusion follows, it is submitted, from the fact that the United States is our sole international sovereign charged with international rights and obligations. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304; *United States* v. *Rauscher*, 119 U. S. 407, 412, 414; *Holmes* v. *Jennison*, 14 Pet. 540, 573; *People* v. *Curtiss*, 50 N. Y. 32.

The Constitution in several express provisions discloses the plan that international relations shall be exclusively a federal matter (Article I, Section 10; Article II, Sections 2–3; Article III, Section 2). Congress has provided for removal from state to federal courts causes involving foreign sovereigns. *Oliver Co.* v. *Mexico*, 264 U. S. 440, case transferred to Circuit Court of Appeals for the Second Circuit, 5 F. (2d) 659; certiorari denied, 267 U. S. 596.

Questions of public international law have always been considered as questions not of local but of national law and concern. *The Lottawanna*, 21 Wall. 558.

The exclusive power of the United States to regulate foreign relations is a necessary concomitant of nationality not dependent upon the affirmative

grants of the Constitution. As an equal member of the family of nations the United States had this power before adoption of the Constitution and the States never possessed this power. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318. It follows from this broad power that even where the Federal Government has not acted affirmatively the states are powerless to act in the field of foreign relations. *United States* v. *Rauscher*, 119 U. S. 407, 412–414; *Henderson et al.* v. *Mayor of New York, et al.*, 92 U. S. 259, 271–272; *Holmes* v. *Jennison*, 14 Pet. 540, 573.

In the *Henderson* case, *supra*, holding unconstitutional a statute of New York requiring shipowners to pay a small fee or tax in lieu of giving a bond for each passenger landed at the port, this Court stated (p. 273):

> A regulation which imposes onerous, perhaps impossible, conditions on those engaged in active commerce with foreign nations, must of necessity be national in its character. It is more than this; for it may properly be called *international*. It belongs to that class of laws which concern the exterior relation of this whole nation with other nations and governments. If our government should make the restrictions of these burdens on commerce the subject of a treaty, there could be no doubt that such a treaty would fall within the power conferred on the President and the Senate by the Constitution. It is in fact, in an eminent degree, a

> subject which concerns our international relations, in regard to which foreign nations ought to be considered and their rights respected, whether the rule be established by treaty or by legislation.

In the *Rauscher* case, *supra,* this Court, holding that one extradited from England to be tried for murder here could not be tried for a minor offense not included in the treaty of extradition with Great Britain, stated (p. 414):

> At this time of day, and after the repeated examinations which have been made by this court into the powers of the Federal government to deal with all such international questions exclusively, it can hardly be admitted that, even in the absence of treaties or acts of Congress on the subject, the extradition of a fugitive from justice can become the subject of negotiation between a state of this Union and a foreign government.

Subjection of foreign sovereigns to state statutes of limitation to which the United States cannot be subjected violates the fundamental rule of the law of nations that all international sovereigns are equal. Neither the United States nor any foreign sovereign can be subjected to suit in any federal or state court. *The Exchange,* 7 Cranch. 116. The immunity of the United States from suit rests upon the same foundation as the immunity from state statutes of limitations. *United States* v. *Thompson,* 98 U. S. 486, 490. The equality which must be extended to a foreign sovereign requires

immunity of foreign sovereigns from state statutes of limitations.

Moreover, subjection of either the United States or a foreign sovereign to the scores of different state statutes of limitations for actions based on simple contract, ranging from three to fifteen years[27] would subject the public rights and property of sovereigns to varying and changing limitations of the states. *United States* v. *Thompson, supra; U. S.* v. *Hoar,* 2 Mason 311. In fields of national activity uniformity is required. *Henderson et al.* v. *Mayor of N. Y. et al., supra.*

Part Three

The Plaintiff in This Action, the Paramount Domestic Sovereign, the United States, Is Not Barred by the State Statute of Limitations

It has been assumed in Part Two, *supra,* solely for purposes of logical organization of this argument, that the United States is in no better position than the Soviet Government in bringing this action. The respondent contends, however, that even if the facts were sufficient for the statute of limitations to run against a private person, which the respondent denies (Part One, *supra,* pp. 11–49), and even if such a state statute could be invoked against a foreign sovereign suing in a federal court, which respondent denies (Part Two, *supra,* pp.

[27] Mix, Statutes of Limitations, 3 Rocky Mountain L. R. 106, 118–129; Appendix, pp. 117–118.

49–82), nevertheless, the statute does not apply in this action because (I) a state statute of limitations is not applicable, under the Federal Rules of Decision Act, in a law action in the federal courts by the United States; and (II) even if the statute bars the Soviet Government's remedy, it does not bar the remedy of the United States.

I

Under the Federal Rules of Decision Act, a State statute of limitations cannot apply to a law action by the United States in the Federal courts

The respondent contends in Part Two, I, *supra*, pp. 50–53, that a state statute of limitations, within the meaning of the Rules of Decision Act (R. S. Sec. 721), does not apply to this law action in a federal court even if the foreign sovereign was the plaintiff. Even assuming that the state statute might apply to a foreign sovereign, still it cannot apply to this action in which the United States is the plaintiff. *United States* v. *Thompson*, 98 U. S. 483; *United States* v. *Hoar*, 2 Mason 311, 26 Fed. Cas. p. 329, No. 15,373, discussed *supra* pp. 50–53, on the related question of application of a state statute of limitations in a law action by a foreign sovereign in a federal court.

In *United States* v. *Thompson*, *supra*, this Court stated at page 490 "it certainly was not [the intention] of Congress in enacting the law of 1789" (the Rules of Decision Act), that a state statute of

limitations, construed to apply to the United States, could be applied in an action at law in the federal courts.

II

Even if the Soviet Government's remedy to recover this claim would be barred by the New York statute of limitations, the remedy of the United States is not barred

The respondent contends that even if the remedy of the Soviet Government in the Federal courts of New York to enforce its right to recover the claim be barred by the New York statute, the remedy of its assignee, the United States, is not barred because generally and as a matter of New York law the statute of limitations affects the remedy and does not extinguish the right.

The New York statute of limitations operates to bar the remedy but does not extinguish the right. *Lightfoot* v. *Davis,* 198 N. Y. 261, 264. This is expressly admitted by the petitioner (Brief pp. 45, 53, 54).

An acknowledgment of the existence of the debt tolls the operation of the statute or, in the event that the statute had run, revives or continues the remedy without a new promise. *Waltemire* v. *Westover,* 14 N. Y. 16, 20–21; *Dean* v. *Hewit,* 5 Wend. (N. Y.) 257, 262; *Lightfoot* v. *Davis, supra.* Even after a defense under the statute has accrued, the legislature may extend the period of limitations or abolish the defense entirely. *Hul-*

bert v. *Clark*, 128 N. Y. 295, 297; *Campbell* v. *Holt*, 115 U. S. 620; *Orman* v. *Van Arsdell*, 12 N. Mex. 344; *McEldowney* v. *Wyatt*, 44 W. Va. 711.[28]

Since the debt owed by the petitioner to the Soviet Government is, therefore, a subsisting debt, the right which the Soviet Government assigned to the United States was and is a valid, subsisting right. The defense of limitations may not be interposed in a suit by the United States. *Phillips* v. *Commissioner*, 283 U. S. 589, 602; *Davis* v. *Corona Coal Co.*, 265 U. S. 219, 222; *Chesapeake & Delaware Canal Co.* v. *United States*, 250 U. S. 123, 125.

Where the statute of limitations operates only upon the remedy and not upon the right, a transfer of a claim to another forum, or of the parties to another domicile, makes possible a successful action upon the debt in the new forum, even though the cause of action had been barred by the law of the state where the claim arose. *Putnam* v. *Dike*, 79 Mass. 535; *Carver* v. *Adams*, 38 Vt. 500.[29] Even the fact that an action was commenced in one forum and there held barred by the statute of limitations of the forum does not preclude the suc-

[28] It is significant to note that the State of New York has itself expressly restored the remedy with respect to claims by or against former Russian corporations "whether or not said action has heretofore been barred by any statute of limitations of this State or any other state or country." New York Civil Practice Act, Sec. 977b, Subsection 18.

[29] See *Tarbell v. Grand Trunk Ry.*, 94 U. S. 449; cf. *Gans* v. *Frank*, 36 Barb (N. Y.) 320, 322–323; Mix, State Statutes of Limitations, 3 Rocky Mountain L. R. 106, 113.

cessful prosecution of the action in another forum in which it was not barred. *Warner* v. *Buffalo Dry Dock Co.*, 67 F. (2d) 540 (C. C. A. 2d), certiorari denied, 291 U. S. 678.[30]

That unenforceable debts may become enforceable by assignment is shown by *South Dakota* v. *North Carolina*, 192 U. S. 286. There a citizen of New York owned certain bonds, assured by the State of North Carolina which, after it had defaulted on its obligation on the bonds, refused to permit suit to be brought against it or to provide a forum. The claimant was barred by the Eleventh Amendment to the Constitution from resorting to Federal courts. More than thirty years after North Carolina's default (p. 323) the holder assigned his claim to the State of South Dakota

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[30] In that case the court allowed recovery on a cause of action not barred under New York law, although a suit thereon had theretofore been brought in Ohio and there held barred by the statute of limitations of that state. The court said (p. 542):

"The law in New York as to the effect of a foreign statute of limitations which does not operate to transfer title to property is likewise that it affects the remedy and not the right. * * * The Ohio decree * * * did not decide that the plaintiff's claim was extinguished, but only that they could not sue in Ohio."

This entire doctrine is, of course, consonant with the theory underlying those cases which hold that where one of several available remedies is barred by limitations, the vindication of the right by an action of a character not barred is not precluded. *United States* v. *Whited & Wheeless*, 246 U. S. 552, 564; *Ganley* v. *Troy City National Bank*, 98 U. S. 487; *Matter of Rodgers*, 153 N. Y. 316.

which instituted an action under the original jurisdiction of this Court, and recovered a judgment against North Carolina. The rule of that case, that where an unenforceable claim has been assigned to a person who has a remedy not available to the assignor, the assignee may assert the claim successfully, is fully applicable to the instant case. Assuming that no remedy was available to the assignor, what the United States received remained at all times an existing, living obligation which may be successfully asserted by the United States, against which the statute of limitations may not be pleaded to defeat the enforcement of its rights.[31]

United States v. *Buford,* 3 Pet. 12, is relied upon by the petitioner as sustaining an opposite doctrine. But that case is to be distinguished from the instant case because there the *obligation* assigned was extinguished by the Kentucky statute of limitations, while here the statute did not extinguish the obligation, but merely barred the *remedy.*

Because of the Kentucky rule that its statute extinguishes the obligation a new promise, creating a new right, is required to create a cause of action.[32]

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[31] See *Administrator of Hungarian Property* v. *Finegold* (K. B. Div.), 144 L. T. Reports 670; *Phelps* v. *McDonald,* 99 U. S. 298, 301–304; *Conegys* v. *Vasse,* 1 Pet. 193, 216.

[32] *Head's Executor* v. *Manners, Admr.,* 5 J. J. March (Ky.) 255, 260, 261; *Harrison* v. *Handley,* 1 Bibb (Ky.) 443, 445; *Bell* v. *Rowland's Admrs.,* 1 Hardin (Ky.) 301, 303.

In *Bell* v. *Morrison,* 1 Pet. 351, this Court, basing its decision on that rule of Kentucky law and affirming a judgment for the defendants, after a jury verdict, based on the Kentucky statute of limitations, stated, in an opinion of Mr. Justice Story, at p. 373:

> * * * The acknowledgment, if it is to operate at all, is to create a new cause of action; to revive a debt which is extinct; and thus to give an action, which has its life from the new promise implied by law from such an acknowledgment, and operating and limited by its purport. It is then, in its essence, *the creation of a new right,* and not the enforcement of an old one.[33]

It follows, therefore, that since in the *Buford* case the right itself was extinguished nothing was assigned to the United States, a situation not presented in the instant case. The courts of the State of New York have rejected the rule of the *Bell* case clearly upon the ground that the New York statute applied only to the remedy.[34]

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[33] In the *Buford* case, counsel for successful party urged upon the Court (p. 25) that:

"The principles recognized in this court in *Bell* v. *Morrison*, 1 Pet. 351, in reference to the statute of limitations, establish the rule to be, that an acknowledgment of the debt will not take the case out of the statute. There must be a promise to pay the debt. The courts of Kentucky have held these principles to be correct, and they support the decision of the circuit court upon the agreement between the defendant and Morrison."

[34] In *Henry* v. *Root*, 33 N. Y. 536, 532–533, 535, the New York Court of Appeals, discussing Mr. Justice Story's opin-

The *Buford* case (as well as *King* v. *Morrall*, 6 Price 24) was urged by counsel for the defendant and in the dissenting opinion (pp. 344–346) in *South Dakota* v. *North Carolina, supra,* as controlling authority, but was rejected by the majority of the Court apparently, we submit, upon the same grounds of distinction urged in the instant case, namely, that in the *South Dakota* case, as here, there was a subsisting right temporarily unenforceable for lack of a remedy. The respondent contends that unless this view of the treatment accorded to the *Buford* case in the *South Dakota* case be adopted, it must be concluded that *sub silentio* this Court there overruled the *Buford* case.

At best, the *Buford* case stands for the proposition that an assignee takes no better *title* than its assignor, but the United States, as assignee, can, and does, possess a *superior remedy* to its assignor.

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ion in the *Bell* case, dealt with the effect of a discharge of a bankrupt by a certificate or under the insolvency law, and stated that in such a case the debt has ceased to exist; to revive the moral obligation a new promise, equivalent to a new contract, was necessary; but, "in the case of a debt barred by the statute of limitations, we have seen that the debt is not discharged, but the remedy by action is only taken away or suspended until the debt is revived."

In *Dean* v. *Hewit*, 5 Wend (N. Y.) 257, the court said (p. 262):

"A recognition of the existence of the debt, after the statute has attached, revives the remedy which was lost; but the course of action is the same as it was before the remedy was barred * * * It cannot be said, then, that the new promise either revives the course of action or the remedy; it only continues the latter * * *."

The right which was assigned to it was never destroyed. Here there was something to assign; in the *Buford* case there was nothing.

The respondent submits, therefore, that in such a situation the United States stands in a better position than a person not possessing the sovereign prerogatives which it enjoys. The debt, lawfully assigned to the United States, may be enforced by it.

Part Four

The New York Statute of Limitations Cannot Impede Consummation of the Litvinov Assignment

Finally, even if a state statute of limitations could apply to the United States, as assignee of a claim, in some circumstances, it cannot apply to defeat or impede enforcement of the claim asserted here under the international compact, known as the Litvinov Assignment, between the United States and the Soviet Government. *United States* v. *Belmont,* 301 U. S. 324. For this reason alone the decision of the court below is correct.

It is apparent that if the New York statute of limitations is applicable to suits by the United States based upon the Litvinov Assignment, the Assignment will be defeated and impeded *pro tanto.*[35]

In *United States* v. *Belmont, supra,* this Court held that an alleged New York State public policy

[35] At the time of the negotiation of this compact, the United States Government had claims against the Russian Government of approximately $300,000,000, and citizens of

against confiscation could not be invoked to defeat a claim to a bank deposit originally owned by a former Russian corporation and obtained by the United States under the Litvinov Assignment. Equally, in the present case, the respondent submits, the alleged bar of the New York statute of limitations, cannot be invoked to defeat a claim to a bank deposit originally owned by the Imperial Russian Government and obtained by the United States under the Litvinov Assignment.

In the *Belmont* case this Court stated at pages 331–332:

> Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. * * * In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist. Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, state constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them

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the United States had filed claims against the Russian Government with the Department of State to the extent of approximately $500,000,000. See Annual Report of the Secretary of the Treasury for fiscal year ended June 30, 1936 (75th Cong., 1st Sess., House Document No. 5), p. 470.

can be interposed as an obstacle to the effective operation of a federal constitutional power. Cf. *Missouri* v. *Holland,* 252 U. S. 416: *Asakura* v. *Seattle,* 265 U. S. 332, 341.

The conduct of our foreign relations is an exclusive national function. Negotiation is entrusted to the President alone. *U. S.* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 319; *MacKenzie* v. *Hare,* 239 U. S. 299, 311. The international compact pursuant to which the United States is seeking to recover the deposit in question, while not a formal treaty requiring the advice and consent of the Senate, is nevertheless one into which the President has authority to enter. *Altman & Co.* v. *United States,* 224 U. S. 583, 601; *United States* v. *Belmont,* 301 U. S., 324; *Monaco* v. *Mississippi,* 292 U. S. 292, 313, 331. The exercise of a federal power may not be trammelled by State legislation. *First National Bank* v. *California,* 262 U. S. 366, 370. See also *Tarble's Case,* 13 Wall. 397, 406; cf. *State* v. *County of Kings,* 125 N. Y. 312, 321.

The disposition of claims asserted by the United States and its nationals against the Soviet Government was a serious problem in the recognition of that Government by the United States. Preparatory to a final settlement, the Soviet Government assigned to the United States all claims which it had, as successor of prior Russian governments, or otherwise, against American nationals. By the acceptance of the Litvinov assignment, the United States impliedly undertook that it was in a position to and would collect the claims. Such an undertaking may not be avoided under interna-

tional law by a claim that the United States lacked full sovereignty and was impeded in the performance of its obligations by state legislation. *Chy Lung* v. *Freeman,* 92 U. S. 275, 280; *Buckner* v. *Finley,* 2 Pet. 586, 590. As this Court stated in the *Belmont* case (p. 327), there is involved a question of public concern, "the determination of which well might involve the good faith of the United States in the eyes of a foreign government."

The petitioner suggests (Brief, pp. 84–87) that the application of the explicit language of this Court in the *Belmont* case, quoted above, to the effect that the Litvinov assignment cannot be impeded by the state laws or policies is to be so narrowly construed as not to apply here. This suggestion cannot prevail. The deliberate character of the broad language used in the opinion of this Court is apparent. The fact that the Court's intimation that American nationals might possibly be able to raise a question under the Fifth Amendment appears only in the separate second part of the opinion and does not modify the first part of the opinion discussing state public policy, carries the strong implication that the question of the application of state laws and policies has been conclusively eliminated from cases involving the Litvinov assignment. The fact that the reference to adverse claims in the opinion had no relation to the first part of this Court's opinion is disclosed by the statement in the opinion at page 327:

> We do not pause to inquire whether in fact there was any policy of the State of

> New York to be infringed, since we are of opinion that no state policy can prevail against the international compact here involved.

The petitioner's alleged defense of the statute of limitations, which may be withdrawn by the legislature, is not an adverse claim protected by the fifth amendment.

Former exercises of the power over foreign relations, in treaties, have been held to override state statutes of limitations. *Ware* v. *Hylton*, 3 Dall. 199; *Hopkirk* v. *Bell*, 3 Cranch 454.

The petitioner's last contention (Brief, pp. 87–91) that the international agreement did not intend to override state and federal [36] statutes cannot prevail in view of this Court's decision in the *Belmont* case that it is inconceivable that any state constitution, law, or policy can be an obstacle to the effective operation of a federal constitutional power. This Court's construction of the international compact was not made solely with relation to the particular facts involved in the *Belmont* case and is applicable to all actions arising under the compact.

The language of the Executive agreement does not support the petitioner's construction, purportedly based on the concurring opinion, that it did not intend to override state laws and policies. Cer-

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[36] The petitioner's reference to a federal statute apparently is solely to the Federal Rules of Decision Act. It is apparent that no conflict between the international compact and that Act is in any way involved.

tainly the language does not suggest that various different state statutes and policies were to control the consummation of this agreement formed in the exercise of the broad external federal power over foreign relations, which is not and cannot be subject to any curtailment or interference on the part of the several states. *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 316.

The national power over foreign relations was exercised in this agreement without regard to the various state statutes of limitations. When this compact was made, it was not intended by the sovereign parties that its consummation should be impeded by such local laws. This is indicated by the considerations (a) that the parties dealt as sovereign equals, (b) that under international law agreements between states are not construed to be affected by municipal statutes of limitations, and (c) that for purposes of our international relations the states of the Union do not exist.

(a) This agreement was made coincidently with the establishment of diplomatic relations between the two governments as equal sovereign powers. States statutes of limitations cannot bind the United States, and it was not intended that they should apply to claims of the Soviet Government to be asserted by the United States.

(b) Scrupulous good faith required in the discharge of the obligations of a compact between the two sovereigns forbids the assertion by one of the

sovereign parties that its municipal law prevents performance. *United States* v. *Belmont, supra;* Willoughby, *Constitutional Law;* Vol. I, Sec. 320 (2d ed.); Advisory Opinion, Permanent Court of International Justice, Series A/B No. 44, February 4, 1932; Oppenheim, *International Law,* Vol. I, Sec. 23 (5th ed.); Fenwick, *International Law,* pp. 75 *et seq.* (2d. ed.).

(c) For purposes of our international relations, the states do not exist. *United States* v. *Belmont, supra.* It follows, therefore, that it cannot be said that in making this international compact the sovereign parties intended that its consummation might be impeded by state statutes of limitations.

The petitioner relies on the absence of express language in the international compact stating that state law shall not affect its consummation. The respondent submits that the fact that the compact was made as an exercise of the power over foreign relations, a field from which the states are completely excluded, and with respect to which they do not exist, strongly implies that state laws shall not impede the compact.

Even in the absence of an express federal intent in fields of exclusively national concern, state action is not permitted. *United States* v. *Rauscher,* 119 U. S. 407, 412–414; *Henderson, et al.* v. *Mayor of New York, et al.,* 92 U. S. 259; *Holmes* v. *Jennison,* 14 Pet. 540, 573; *People* v. *Curtis,* 50 N. Y. 32. Even in fields of concurrent internal powers, silence

of Congress has been interpreted as prohibiting action by the states. *Cooley* v. *Board of Wardens*, 53 U. S. 299; cf. *Kelley, et al.* v. *State of Washington ex rel. Foss Co., Inc.*, 302 U. S. 1. Even in the absence of an exercise of the foreign relations power, and certainly in this case of an exercise of that power, state action cannot be permitted.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted.

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APPENDIX

STATUTES AND EXECUTIVE AGREEMENT INVOLVED

The Rules of Decision Act, Rev. Stat., Sec. 721 (U. S. C. Title 28, Sec. 725), provides:

> The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.

The Civil Practice Act of the State of New York provides, so far as material:

> SEC. 15. Where a right exists, but a demand is necessary to entitle a person to maintain an action, the time within which the action must be commenced must be computed from the time when the right to make the demand is complete except in one of the following cases:
>
> * * * * *
>
> 2. Where there was a deposit of money not to be repaid at a fixed time but only upon a special demand, or a delivery of personal property not to be returned specifically or in kind at a fixed time or upon a fixed contingency, the time must be computed from the demand.
>
> * * * * *
>
> SEC. 48. The following actions must be commenced within six years after the cause of action has accrued:

1. An action upon a contract obligation or liability express or implied, except a judgment or sealed instrument.

* * * * *

SEC. 54. The limitations prescribed in this article for actions other than for the recovery of real property apply alike to actions brought in the name of the people of the State, or for their benefit, and to actions by private persons.

* * * * *

SEC. 977-b—SUBSECTION 18. The time between the cessation of business by the corporation or its dissolution or nationalization or the suspension, repeal, revocation, or annulment of its charter or organic law and the appointment of a receiver in this state pursuant to this section, whichever time is longer, plus three years after such appointment, shall not be a part of the time limited by domestic or foreign law for the commencement of an action by or on behalf of or against said corporation or by or against said receiver, whether or not said action has heretofore been barred by any statute of limitations of this state or of any other state or country.

The Rules of Civil Practice of the State of New York provide, so far as material:

RULE 107. Within twenty days after the service of the complaint, the defendant may serve notice of motion for judgment dismissing the complaint, or one or more causes of action stated therein, on the complaint and affidavit stating facts tending to show:

* * * * *

6. That the cause of action did not accrue within the time limited by law for the commencement of an action thereon.

RULE 108. If the plaintiff on the hearing of a motion specified in the last rule shall present affidavits denying the facts alleged by the defendant or shall state facts tending to obviate the objection, the court may hear and determine the same and grant the motion, and in its discretion allow the plaintiff to amend the complaint upon such terms as are just; or it may direct that the questions of fact, which shall be clearly and succinctly stated in the order, be tried by a jury or referee, the findings of which shall be reported to the court for its action; or it may overrule the objections, and in its discretion may allow the same facts to be alleged in the answer as a defense. If the objections be made to some of the causes of action, and not to all, judgment may be entered as provided in section ninety-six of the civil practice act or rule one hundred and ninety-five of the rules of civil practice.

INTERNATIONAL COMPACT

The executive agreement concluded November 16, 1933, between the President of the United States and the People's Commissar for Foreign Affairs of the Union of Soviet Socialist Republics, consisted in an exchange of letters as follows:

WASHINGTON, *November 16, 1933.*

MY DEAR MR. PRESIDENT: Following our conversations I have the honor to inform you that the Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counter claims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new

litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment.

The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above not to make any claim with respect to:

(a) Judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,

(b) Acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof.

I am, my dear Mr. President,

Very sincerely yours,

MAXIM LITVINOFF,
People's Commissar for Foreign Affairs,
Union of Soviet Socialist Republics.

MR. FRANKLIN D. ROOSEVELT,
President of the United States of America,
The White House.

THE WHITE HOUSE,
WASHINGTON, *November 16, 1933.*

MY DEAR MR. LITVINOV: I am happy to acknowledge the receipt of your letter of November 16, 1933, in which you state that:

"The Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counter claims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment.

"The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above, not to make any claim with respect to:

"(a) Judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,

"(b) Acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof."

I am glad to have these undertakings by your Government and I shall be pleased to notify your Government in each case of any amount realized by the Government of the United States from the release and assignment to it of the amounts admitted to be due, or that may be found to be due, the Government of the Union of Soviet Socialist Republics, and of the amount that may be found to be due on the claim of the Russian Volunteer Fleet.

I am, my dear Mr. Litvinov,
Very sincerely yours,

FRANKLIN D. ROOSEVELT.

MR. MAXIM LITVINOV
People's Commissar for Foreign Affairs,
Union of Soviet Socialist Republics.

RETIREMENT OF BAKHMETEFF

Exchange of Correspondence between Secretary Hughes and Mr. Bakhmeteff, April 28 and 29, 1922 [1]

RUSSIAN EMBASSY,
Washington, April 28, 1922.

MY DEAR MR. SECRETARY: In view of recent events I think it advisable to bring forward once more the subject of my position as the representative of Russia in the United States.

Received at Washington in July 1917, as Ambassador of the first democratic govern-

[1] Issued by the Department of State as a mimeographed press release, June 4, 1922.

ment of Russia, I have remained at my post up to the present time in order to serve and protect Russian national interests and to facilitate, in cooperation with the Treasury and State Departments, the liquidation and final settlement of a large volume of commercial business for which the Government of Russia stood obligated, partly through my agency, to American business concerns. I am happy to believe that American as well as Russian interests have been served thereby.

The work of liquidation has now been brought to a practical close. At the same time my status as Ambassador has been made the subject of renewed discussion. I am led to question whether my continuance, as Ambassador of Russia, will longer serve the best interests of my country and the convenience of the United States Government. I am prepared if the United States Government so desires, to retire and terminate my official functions.

On account of personal matters I have planned to sail from this country within the near future. It would be necessary to wind up my affairs and to arrange for the custody of the Russian property for which I am responsible. This work could be completed about the 30th of June, which date could be regarded as the date on which my retirement from official duties would take effect.

In the event of my retirement I suggested that Mr. Serge Ughet, Financial Attaché of the Embassy, be recognized as custodian of the properties in question and as the agent through whom pending business can be transacted and terminated.

In assuring you of my deep appreciation of the personal consideration I have always enjoyed at the hands of the State Depart-

ment, and other Departments of the American Government, I desire to express also my gratitude for the good will and consideration with which the United States has treated my country. America was first to welcome the advent of democracy in Russia and to recognize the Provisional Government. Since then and throughout Russia's great trial the United States has evidenced deep and sympathetic understanding of Russia's process of transformation and has conserved unbroken faith in the regeneration and happy future of the Russian people. The United States has lent friendly effort in preserving for the Russian people the integrity of their national patrimony and in safeguarding their economic freedom. Finally America has generously come to the relief of suffering and saved millions of Russians from starvation. For this assistance and support in the hour of distress Russia will conserve enternal gratitude.

I avail myself of the opportunity to express to you, my dear Mr. Secretary, the renewed assurances of my high esteem.

B. BAKHMETEFF.

The Honorable
The SECRETARY OF STATE,
Department of State.

DEPARTMENT OF STATE,
Washington, April 29, 1922.

MY DEAR MR. AMBASSADOR: I have received your letter of April 28, 1922, in which you bring forward the question of your status as Ambassador in the United States and suggest that it may be appropriate to have this terminate in the near future, inas-

much as the liquidation and final settlement of the business of the Russian Government in the United States for which you were responsible is now practically completed, and as your continuance as Ambassador under the existing circumstances may give rise to misunderstanding.

I believe that a change in the present situation is desirable and I am glad to be able to concur in your suggestions as to how this may best be brought about.

You will continue to be recognized as Ambassador until June 30 next. After this date the custody of the property of the Russian Government in this country for which you have been responsible will be considered to vest in Mr. Serge Ughet, the Financial Attaché of the Embassy. Mr. Ughet's diplomatic status with this Government will not be altered by the termination of your duties and he will continue to enjoy the usual diplomatic privileges and immunities.

With assurance of my high esteem and appreciating the friendly spirit in which you have dealt with all matters of interest to this Government, I am, my dear Mr. Bakhmeteff,

Very sincerely yours,

CHARLES E. HUGHES.

His Excellency
Mr. BORIS BAKHMETEFF,
Ambassador of Russia.

DEPARTMENT OF STATE,

The Honorable THE ATTORNEY GENERAL.

SIR: In response to your inquiry regarding the intention of the Government of the United States and the Government of the Union of Soviet Socialist Republics as set

forth in the exchange of letters dated November 16, 1933, between the People's Commissar for Foreign Affairs of the Union of Soviet Socialist Republics and the President of the United States relating to the assignment to the United States of amounts due the Soviet Government, you are advised as follows:

The second paragraph of the letter signed by the People's Commissar for Foreign Affairs has at all times been interpreted by this Government as in no way restricting or narrowing the scope of the assignment as set forth in the first paragraph of the said letter.

By Subdivision (b) of the second paragraph of this letter the Government of the Union of Soviet Socialist Republics is understood to have agreed not to make any claim in connection with adjustments, compromises, or agreements entered into or approved by any official of the Government of the United States or any State or Subdivision thereof, relating to property, credits, or obligations of any Government of Russia or nationals thereof.

Very truly yours,

R. WALTON MOORE, *Counselor.*

The Soviet Statute of Limitations is contained in Sections 44 to 51, inclusive, of the Civil Code of the R. S. F. S. R. In its original form, Section 44, which went into effect on January 1, 1923, read as follows:

> The right to sue is extinguished upon the expiration of a three year period (actionable period) if no other period of limitation is established by law.[1]

With the development of the economic policy of the Soviet Union, and the gradual assumption of the majority of economic functions by the State, legislation was enacted providing certain special, shortened periods of limitation for disputes among the various State agencies and enterprises. Thus, the present version of the statute, constituting a

[1] The other sections of the statute provided that it began to run when the right to bring suit arose except where a demand obligation was involved, in which case the statute began to run from the time when the obligation arose (§ 45); that the barring of the principal claim barred all collateral claims (e. g., interest) as well (§ 46); that the performance of an obligation by a debtor after the statute had run gives no rise to an action for repayment (§ 47). The running of the statute became suspended if the claimant, as the result of insuperable force, could not sue (§ 48). In any case in which the court should find that the period of limitations had lapsed for meritorious reasons, it had the power to restore the cause of action and to extend the period (§ 49). The running of the statute was terminated by the institution of an action, as well as by any acts on the part of the obligor evidencing acknowledgment of the debt (§ 50), and upon such termination the statute began to operate anew (§ 51).

consolidation of numerous laws passed since 1923, prescribes, among others, a six months period for claims arising from delivery of goods of improper quality, a one year period for claims arising from combined rail, water, and air transport, and the like. However, the original three year general period of limitation remains unimpaired.

The case cited by the petitioner (Br. p. 113), *Administration of Siberian Railroads* v. *Representative of the Superior Council of Peoples Economy,* falls precisely into the group of cases affected by a special statute of limitations. The plaintiff received certain promissory notes from the defendant in payment for freight. The notes were not paid, and a judgment was recovered in an action brought before the Arbitration Council. Thereafter, the plaintiff sued to recover the difference in currency value occasioned by the fall in the value of the ruble in the course of the litigation. The defendant pleaded the expiration of the statute of limitations prescribed by Sections 101 and 102 of the Railroad Code, which provided that actions by railroads for the recovery of freight charges must be brought within *one year* after the cause of action accrued. The lower court upheld the defense, but granted the plaintiff leave to apply for an extension of the period of limitation under Sec. 49 of the Civil Code. On appeal, the Civil Cassation Collegium of the Supreme Court held that the cause of action had been barred by the

statute which, being a *special, shortened statute,* was not subject to discretionary extension.

The general rule concerning the exemption of State property and rights from the operation of the Statute of Limitations, has been expressed by an Explanation of the Plenum of the Supreme Court of the R. S. F. S. R., issued on June 29, 1925:

> * * * Under the law of the R. S. F. S. R. there is created the general presumption that all disputed property in the territory of the R. S. F. S. R. is State property until the contrary should be established * * * otherwise, in the absence in our law of the doctrine of acquisition by prescription, a considerable amount of property would remain without an owner * * *
>
> * * * The general rules concerning extinctive prescription (§ 44 GK) may not be applied to the recovery of State property from the illegal possession of another, particularly as the result of invalidity (by illegality) of a contract, because the right of ownership of the State is either a continuous right, or it arises only at the moment when the private owner loses his right through the invalid contract, i. e., by the expiration of the period of limitation upon the claim of the private owner to recover property which he had lost under the invalid contract.

This ruling has been uniformly followed in Soviet law. It has appeared, without modification, in every edition of "Collected Interpretations of the Supreme Court." In its report for the year 1925, the Civil Cassation Collegium stated (E. S. J., 1927, No. 4) that in connection with the Explanation

supra it had occasion to rule that the statute did not apply to suits of State organs for the recovery of property which for one reason or another should pass into their possession, mainly by virtue of Sec. 59 of the Civil Code, which provides that an owner has the right to recover his property from the illegal possession of another. However, the Collegium did hold the statute applicable in certain actions in which private, proprietary claims were asserted, such as one in which a State agency tried to recover damages caused by an individual more than three years before the action was brought. To this latter category may be relegated the decision of the Civil Cassation Collegium of April 1, 1929 (*Moscow Council of National Economy* v. *Zaglodin*) cited by the petitioner (Br. pp. 113–114), in which a State agency sued to recover rent from a private person.

We do not contend that the Soviet statute would not run against a claim of the Soviet State when it acts in a private, proprietary capacity. But where the State acts in its public capacity, to recover State property or to enforce or protect a public right, the decisions of the Soviet courts are unanimous in upholding the exemption.

Thus, in *Riazan Gubkommunotdel* v. *Kuleshov*, decided by the Civil Cassation Collegium (E. S. J., 1926, No. 37, Case N. 3582), the statute was held not to extend to suits by the State to recover property, occupied by the defendant, to which it had

become entitled by escheat by virtue of lapse of succession. In *Talimov Provincial Procurator* v. *Riazanov and Kuznetzov,* Civil Cassation Collegium (S. P., 1927, No. 10, Case No. 3672) the plaintiff, State's Attorney, brought an action to recover from the defendants a mill nationalized in 1921, but occupied by the defendants until 1926. The lower court dismissed the action by reason of the statute of limitations. On appeal, the court held that since the Procurator denied the defendants' right of ownership the claim had to be examined on the merits; and that the appearance of the Procurature, in the presence of a public interest, may not be compared with a private civil suit.

The *distinction* pressed by the petitioner at page 114 of its brief upon *Narkomprod* v. *Mosselprom,* 2 Dec. V. A. K. (Supreme Arbitration Council) No. 98, in which the possession of a factory was involved, and *Saratov Gubkomotdel* v. *Riazan-Ural R. R.,* 3 Dec. V. A. K. No. 106, in which one State agency tried to recover rent for premises occupied by another, precisely defines the rule that when *public rights* are involved, the statute does not run.

Thus, in *Tashkent Railway* v. *Kirghiz Central Council of National Economy,* 4 Dec. V. A. K. No. 378, which involved the recovery of certain hospital equipment given by the plaintiff to the defendant, and in *Volga-Caspian Fishing Bureau* v. *Riazan-Ural Railway,* decided by the V. A. K. on March 6, 1924, the court held that disputes arising from

public-legal relations must be examined upon the merits, regardless of the time when the suit is brought, and in *Administration of Archangel Commercial Port* v. *Severo-Belomorskoe Regional Administration,* 6 Dec. V. A. K. No. 78, where plaintiff sought to recover possession of certain storage houses and was met with the defense of limitations, the court stated, after holding that for other reasons the statute had not run, that

> where, as here, the dispute between State institutions concerns a public right, such a dispute cannot be extinguished by the three year period of limitations established for civil claims.

To the same effect is *Archangel Sevgosrybtrest* v. *Petchor River Gosparokhodstvo,* 6 Dec. V. A. K. No. 98, in which the dispute involved a river steamship.

Just as it is important to note that budgetary and accounting consideration impelled the Soviet Union to prescribe a number of special, short periods of limitation, it is essential to give proper importance to the presumption of State ownership existing in Soviet law. The very absence of acquisitive prescription in Soviet law to which the Petitioner points, taken together with the rule, uniformly expressed,[2] that "for the State, in the recovery of its property, *there is no prescription,* since we do not recognize acquisition by prescription, and

[2] P. I. Stuchka, "Civil Law and the Practice of Its Application," 3 Revolution of Law No. 2, pp. 131, 141.

property in some one's possession without a legal basis would thus remain ownerless; and ownerless property passes to the State," shows that in no event could the statute be applied to claims of the State *qua* State. This doctrine has been carried to the extent that in one case, *Klykov and Filimonova* v. *Dovgulin,* Civil Cassation Collegium (S. P., 1929, No. 19, Case No. 31846), where in a partition action the plaintiffs were held to have been barred by the statute, the court awarded their shares to the State, upon the ground that the defendant did not acquire anything by the lapse of limitations, in the absence of acquisitive prescription.

In view of the above, the true conclusion to be drawn from the Soviet Law as interpreted by its Courts is that there is a general three-year statute of limitations, but the Soviet Government is exempted therefrom when it sues in its sovereign capacity, asserting public rights or to recover public property. Petitioner's brief (p. 114) apparently admits this exemption which is accorded to the Soviet Government. That exemption would, under the principle of comity, which is accepted in the U. S. S. R. as elsewhere, be extended to the foreign sovereign suing in the Soviet Courts and asserting its sovereign or public rights.[8]

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[8] Statement of Petitioner (Br. p. 114) that "It is indisputable, however, that an action by a foreign sovereign, in the courts of Russia, if permitted, would be held not to involve public rights" is not justified by any authority.

The text writers on Soviet law state that this is the proper conclusion to be drawn, as indicated in the following (A. G. Goikhbarg, in "International Law" (Moscow, 1928), p. 77):

> Our laws are silent about the rights of foreign States and of other foreign public-legal juridical persons in the territory of the U. S. S. R. This question is partly resolved in several conventions (e. g., convention with Germany). Generally, however, it should be said that a foreign State, as such, enjoys the rights of a juridical person in so far as between the U. S. S. R. and that foreign State there have been established normal diplomatic relations.

It is submitted, therefore, if the converse of the case at bar arose in the Soviet courts, and the United States Government sought to enforce a public right or to recover public property in Soviet courts, they would hold the United States, a foreign sovereign, to be exempt from the local statute of limitations.

Limitation periods which prevail in States of the United States

State	Accounts	Contracts in writing			Contracts not in writing	Judgments		Not otherwise specified
		Sealed	Unsealed			Domestic	Foreign	
			Promissory notes	Contracts				
Alabama	3 years	10 years	6 years	6 years	6 years	20 years	20 years	6 years.
Alaska	6 years	10 years	6 years	6 years	6 years	10 years	10 years	10 years.
Arizona	4 years	4 years	6 years	6 years	3 years	5 years	4 years	No limit.
Arkansas	3 years	5 years	5 years	5 years	3 years	10 years	10 years	5 years.
California	4 years	4 years	4 years	4 years	2 years	5 years	5 years	4 years.
Colorado	6 years	6 years	6 years	6 years	6 years	20 years	20 years	3 years.
Connecticut	6 years	17 years	17 years	6 years	3 years	No limit	No limit	No limit.
Delaware	No limit	20 years	6 years	6 years	3 years	5 years	5 years	No limit.
District of Columbia	3 years	12 years	3 years	3 years	3 years	12 years	No limit	3 years.
Florida	3 years	20 years	5 years	5 years	3 years	20 years	7 years	4 years.
Georgia	4 years	20 years	6 years	6 years	4 years	7 years	5 years	4 years.
Hawaii	6 years	6 years	6 years	6 years	6 years	20 years	No limit	6 years.
Idaho	4 years	5 years	5 years	5 years	4 years	6 years	6 years	4 years.
Illinois	5 years	10 years	10 years	10 years	5 years	20 years	5 years	5 years.
Indiana	6 years	10 years	10 years	10 years	6 years	20 years	20 years	15 years.
Iowa	5 years	10 years	10 years	10 years	5 years	20 years	20 years	5 years.
Kansas	3 years	5 years	5 years	5 years	3 years	Execution every 5 years.	Execution every 5 years.	5 years.
Kentucky	2 years	15 years	5 years	15 years	5 years	15 years	15 years	10 years.
Louisiana	3 years	10 years	5 years	Probably 10 years.	No limit	10 years	10 years	10 years.
Maine	6 years	20 years	6 years if not signed by att. wit.	6 years	6 years	20 years	20 years	20 years.

Maryland	3 years	12 years	3 years	3 years	3 years	12 years	12 years	No limit.
Massachusetts	6 years	20 years	20 years	6 years	6 years	20 years	20 years	No limit.
Michigan	6 years	No limit	6 years	6 years	6 years	10 years	10 years	6 years.
Minnesota	6 years	6 years	6 years	6 years	6 years	10 years	10 years	6 years.
Mississippi	3 years	6 years	6 years	6 years	3 years	7 years	7 years	6 years.
Missouri	5 years	10 years	10 years	10 years	5 years	10 years	10 years	10 years.
Montana	5 years	8 years	8 years	8 years	5 years	10 years	10 years	5 years.
Nebraska	4 years	5 years	5 years	5 years	4 years	Kept alive by exec. every 5 years.	5 years	4 years.
Nevada	4 years	6 years	6 years	6 years	4 years	6 years	6 years	4 years.
New Hampshire	6 years	20 years	6 years	6 years	6 years	20 years	20 years	6 years.
New Jersey	6 years	16 years	6 years	6 years	6 years	20 years	No statutory limit	No limit.
New Mexico	4 years	6 years	6 years	6 years	4 years	7 years	7 years	4 years.
New York	6 years	20 years	6 years	6 years	6 years	20 years	20 years	10 years.
North Carolina	3 years	10 years	3 years	3 years	3 years	10 years	10 years	10 years.
North Dakota	6 years	6 years	6 years	6 years	6 years	10 years	10 years	6 years.
Ohio	6 years	15 years	15 years	15 years	6 years		No time limit	10 years.
Oklahoma	3 years	5 years	5 years	5 years	3 years	5 years	1 year	5 years.
Oregon	6 years	10 years	6 years	6 years	6 years	10 years	10 years	10 years.
Pennsylvania	6 years	20 years	6 years	6 years	6 years	20 years	No limit	6 years.
Rhode Island	6 years	20 years	6 years	6 years	6 years	20 years	20 years	20 years.
South Carolina	6 years	20 years	6 years	6 years	6 years	20 years	20 years	10 years.
South Dakota	6 years	20 years	6 years	6 years	6 years	20 years	10 years	10 years.
Tennessee	6 years	6 years	6 years	6 years	6 years	10 years	10 years	10 years.
Texas	2 years	4 years	4 years	4 years	2 years	10 years	10 years	4 years.
Utah	4 years	6 years	6 years	6 years	4 years	8 years	8 years	4 years.
Vermont	6 years	8 years	6 years	6 years	6 years	8 years	8 years	No limit.
Virginia	3 years	10 years	5 years	5 years	3 years	10 years	10 years	5 years.
Washington	3 years	6 years	6 years	6 years	1 years	6 years	6 years	2 years.
West Virginia	5 years	10 years	10 years	10 years	5 years	10 years	10 years	5 years.
Wisconsin	6 years	20 years	6 years	6 years	6 years	20 years	10 years	6 years.
Wyoming	8 years	10 years	10 years	10 years	8 years	5 years		10 years.

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p.p. 3,5,6,7,9,12,8,

SUPREME COURT OF THE UNITED STATES.

No. 566.—October Term, 1937.

Guaranty Trust Company of New York, Petitioner,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 25, 1938.]

Mr. Justice Stone delivered the opinion of the Court.

The principal questions for decision are whether, in a suit at law brought in a federal district court to recover the deposit of a foreign government with a New York bank, such government is subject to the local statute of limitations as are private litigants; and, if so, whether the assignment of November 16, 1933, by the Russian Soviet Government to the United States of the right of the former to the bank account restricts or overrides the operation of the statute of limitations. A subsidiary question is whether in the circumstances of the case the running of the statute of limitations, if otherwise applicable, was affected by our nonrecognition of the Soviet Government during the interval of approximately sixteen years between recognition of the Provisional Government of Russia and recognition of its successor.

On July 15, 1916, the Imperial Russian Government opened a bank account with petitioner, the Guaranty Trust Company, a New York banking corporation. On March 16, 1917, the Imperial Government was overthrown and was succeeded by the Provisional Government of Russia which was recognized by the United States on March 22, 1917. On July 5, 1917, Mr. Boris Bakhmeteff was officially recognized by the President as the Ambassador of Russia. On July 12, 1917, the account being overdrawn, $5,000,000 was deposited in the account by Mr. Serge Ughet, Financial Attache of the Russian Embassy in the United States. On November 7, 1917, the Provisional Government was overthrown and was succeeded by the government of the Union of Soviet Socialist Republics, which will be referred to as the Soviet Government. At that time there remained on deposit in the account the sum of

approximately $5,000,000. On November 28, 1917, the Soviet Government dismissed Bakhmeteff as Ambassador and Ughet as Financial Attache. But the United States continued to recognize Bakhmeteff as Ambassador until on June 30, 1922, he withdrew from his representation of the Russian Government. Thereafter, until November 16, 1933, it continued to recognize the Financial Attache, and after the retirement of Bakhmeteff as Ambassador it recognized the former as custodian of Russian property in the United States.

On November 16, 1933, the United States recognized the Soviet Government, and on that date took from it an assignment of all "amounts admitted to be due that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations . . ." After making demand upon the petitioner for payment of the balance of the account the United States, on September 21, 1934, brought the present suit in the district court for southern New York to recover the deposit. Petitioner then moved under the Conformity Act, 28 U. S. C. § 724; New York Civil Practice Act, § 307; and Rules 107 and 120 of the New York Rules of Civil Practice, to dismiss the complaint on the ground that the recovery was barred by the New York six year statute of limitations.

In support of the motion petitioner submitted numerous affidavits, two depositions, and other documentary proof tending to show that on February 25, 1918, it had applied the balance of the account as a credit against indebtedness alleged to be due to it by the Russian Government by reason of the latter's seizure of certain ruble deposit accounts of petitioner in Russian private banks; that on that date it had repudiated all liability on the deposit account; and that it had then given notice of such repudiation to the Financial Attache of the Russian Embassy and later both to the Financial Attache and to Bakhmeteff as Ambassador. The United States submitted affidavits and exhibits in opposition. The district court found that petitioner had repudiated liability on the account on February 25, 1918; that it had given due notice of repudiation prior to June 30, 1922 to both the Financial Attache and Ambassador Bakhmeteff; and that recovery was barred by the applicable six year statute of limitations of New York. New York Civil Practice Act, § 48. The Court of Appeals for the second circuit reversed the judgment for petitioner, holding that the New

York statute of limitations does not run against a foreign sovereign. 91 F. (2d) 898. Moved by the importance of the questions involved, we granted certiorari. — U. S. —.

Respondent argues that the Soviet Government, in a suit brought in the federal courts, is not subject to the local statute of limitations both because a foreign, like a domestic sovereign, is not subject to statutes of limitations, and its immunity as in the case of a domestic sovereign constitutes an implied exception to that statute and to the Conformity Act; and because in any case, since no suit to recover the deposit could have been maintained in New York by the Soviet Government prior to its recognition by the United States and, since according to New York law the statute does not run during the period when suit cannot be brought, the present suit is not barred. It is insisted further that even though the Soviet Government is bound by the local statute of limitations the United States is not so bound, both because the New York statute which bars the remedy but does not extinguish the right is not applicable to the United States, and because the statute is inoperative and ineffective since it conflicts with and impedes the execution of the Executive Agreement between the Soviet Government and the United States by which the assignment was effected. Finally, the Government assails the finding of fact of the district court that petitioner repudiated the liability upon the deposit account, and contends that notice of the repudiation given by petitioner to representatives of the Provisional Government was ineffective to set the statute running against the Soviet Government and in favor of petitioner.

First. The rule *quod nullum tempus occurrit regi*—that the sovereign is exempt from the consequences of its laches, and from the operation of statutes of limitations—appears to be a vestigial survival of the prerogative of the Crown. See *Magdalen College Case,* 11 Co. Rep. 66b, 74b; Hobart, L. C. J. in *Sir Edward Coke's Case,* Gobd. 289, 295; Bracton, De Legibus, Lib. ii, c. 5, § 7. But whether or not that alone accounts for its origin, the source of its continuing vitality where the royal privilege no longer exists is to be found in the public policy now underlying the rule even though it may in the beginning have had a different policy basis. Compare Maine, Ancient Law (10th ed., 1930) 32 *et seq.* "The true reason . . . is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss by

the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation, or exception, introduced for the public benefit, and equally applicable to all governments." Story, J., in *United States* v. *Hoar*, Fed. Cas. No. 15,373, p. 330. Regardless of the form of government and independently of the royal prerogative once thought sufficient to justify it, the rule is supportable now because its benefit and advantage extend to every citizen including the defendant, whose plea of laches or limitation it precludes; and its uniform survival in the United States has been generally accounted for and justified on grounds of policy rather than upon any inherited notions of the personal privilege of the king. *United States* v. *Kirkpatrick*, 9 Wheat. 720, 735; *United States* v. *Knight*, 14 Pet. 301, 315; *United States* v. *Thompson*, 98 U. S. 486, 489; *Fink* v. *O'Neil*, 106 U. S. 272, 281; *United States* v. *Nashville, C. & St. L. R. Co.*, 118 U. S. 120, 125. So complete has been its acceptance that the implied immunity of the domestic "sovereign", state or national, has been universally deemed to be an exception to local statutes of limitations where the government, state or national, is not expressly included; and to the Conformity Act. See *United States* v. *Thompson, supra.*

Whether the benefit of the rule should be extended to a foreign sovereign suing in a state or federal court is a question to which no conclusive answer is to be found in the authorities. Diligent search of counsel has revealed no judicial decision supporting such an application of the rule in this or any other country. The alleged immunity was doubted in *French Republic* v. *Saratoga Vichy Spring Co.*, 191 U. S. 427, 437, and in *Commissioners of the Sinking Fund of Louisville* v. *Buckner*, 48 Fed. 533. It was rejected in *Western Lunatic Asylum* v. *Miller*, 29 W. Va. 326, 329, and was disregarded in *Royal Italian Government* v. *International Committee of Y. M. C. A.*, 273 N. Y. 468, where neither appellate court delivered an opinion.

The only support found by the court below for a different conclusion is a remark in the opinion of the Court in *United States* v. *Nashville, C. & St. L. R. Co., supra,* where its holding that the United States, suing in a federal court, is not subject to the local statute of limitations, was said to rest upon a great principle of public policy "applicable to all governments alike". The statement is but a paraphrase, which has frequently appeared in judicial

opinion,[1] of Mr. Justice Story's statement in *United States* v. *Hoar*, *supra*, already quoted. His reference to the public policy supporting the rule that limitation does not run against a domestic sovereign as "equally applicable to all governments" was obviously designed to point out that the policy is as applicable to our own as to a monarchical form of government, and is therefore not to be discarded because of its former identity with the royal prerogative. We can find in that pronouncement and in its later versions no intimation that the policy underlying exemption of the domestic sovereign supports its extension to a foreign sovereign suing in our courts.

It is true that upon the principle of comity foreign sovereigns and their public property are held not to be amenable to suit in our courts without their consent. See *The Exchange*, 7 Cranch 116; *Berizzi Bros.* v. *S. S. Pesaro*, 271 U. S. 562; *The Navemar*, No. 242 this term, decided January 31, 1938. But very different considerations apply where the foreign sovereign avails itself of the privilege, likewise extended by comity, of suing in our courts. See *The Sapphire*, 11 Wall. 164, 167; *Russian S. F. S. Republic* v. *Cibrario*, 235 N. Y. 255. By voluntarily appearing in the rôle of suitor it abandons its immunity from suit and subjects itself to the procedure and rules of decision governing the forum which it has sought. Even the domestic sovereign by joining in suit accepts whatever liabilities the court may decide to be a reasonable incident of that act. *United States* v. *The Thekla*, 266 U. S. 328, 340, 341; *United States* v. *Stinson*, 197 U. S. 200, 205; *The Davis*, 10 Wall. 15; *The Siren*, 7 Wall. 152, 159.[2] As in the case of the domestic sovereign in like situation, those rules, which must be assumed to be founded on principles of justice applicable to in-

[1] United States v. Knight, 14 Pet. 301, 315; Gibson v. Chouteau, 13 Wall. 92, 99; United States v. Thompson, 98 U. S. 486, 490; Fink v. O'Neil, 106 U. S. 272, 281.

[2] A foreign sovereign as suitor is subject to the local rules of the domestic forum as to costs, Republic of Honduras v. Soto, 112 N. Y. 310; Emperor of Brazil v. Robinson, 5 Dowl. 522; Otho, King of Greece v. Wright, 6 Dowl. 12; The Beatrice, 36 L. J. Adm. 10; Queen of Holland v. Drukker, (1928) Ch. 877, 884, although the local sovereign does not pay costs. United States v. Verdier, 164 U. S. 213, 219. The foreign sovereign suing as a plaintiff must give discovery. Rothschild v. Queen of Portugal, 3 Y. & C. Ex. 594, 596; United States v. Wagner, L. R. 2 Ch. App. 582, 592, 595; Prioleau v. United States, L. R. 2 Eq. 659. A foreign sovereign plaintiff "should so far as the thing can be done be put in the same position as a body corporate". Republic of Costa Rica v. Erlanger, L. R. 1 Ch. D. 171, 174; Republic of Peru v. Weguelin, L. R. 20 Eq. 140, 141; cf. King of Spain v. Hullett, 7 Bligh N. S. 359, 392.

dividuals, are to be relaxed only in response to some persuasive demand of public policy generated by the nature of the suitor or of the claim which it asserts. That this is the guiding principle sufficiently appears in the many instances in which courts have narrowly restricted the application of the rule *nullum tempus* in the case of the domestic sovereign.[3] It likewise appears from those cases which justify the rule as applied to the United States suing in a state court, on the ground that it is sovereign within the state and that invocation of the rule *nullum tempus* protects the public interest there as well as in every other state. *United States* v. *Beebe*, 127 U. S. 338; *Swearingen* v. *United States*, 11 Gill. & J. 373; *McNamee* v. *United States*, 11 Ark. 148; cf. *United States* v. *California*, 297 U. S. 175, 186.

We are unable to discern in the case where a foreign sovereign, by suit, seeks justice according to the law of the forum, any of the considerations of public policy which support the application of the rule *nullum tempus* to a domestic sovereign. The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time. It has long been regarded by this Court and by the courts of New York as a meritorious defense, in itself serving a public interest. *Bell* v. ~~Morris, 1 Pet. 161, 180;~~ *M'Cluny* v. *Silliman*, 3 Pet. 270, 278; *Campbell* v. *Haverhill*, 155 U. S. 610, 617; *United States* v. *Oregon Lumber Co.*, 260 U. S. 290; *Bank* v. *Barnaby*, 197 N. Y. 210, 227; *Schmidt* v. *Merchants Despatch Transportation Co.*, 270 N. Y. 287, 302. Denial of its protection against the demand of the domestic sovereign in the interest of the domestic community of which the debtor is a part could hardly be thought to argue for a like surrender of the local interest in favor of a foreign sovereign and the community which it repre-

[3] The presumption of a grant by lapse of time will be indulged against the domestic sovereign. United States *v.* Chaves, 159 U. S. 452, 464. The rule *nullum tempus* has never been extended to agencies or grantees of the local sovereign such as municipalities, county boards, school districts and the like. Metropolitan R. Co. *v.* District of Columbia, 132 U. S. 1; Boone County *v.* Burlington and M. R. R. Co., 139 U. S. 684, 693. It has been held not to relieve the sovereign from giving the notice required by local law to charge endorsers of negotiable paper, United States *v.* Barker, 12 Wheat. 559; cf. Cooke *v.* United States, 91 U. S. 389, 398; Wilber National Bank *v.* United States, 294 U. S. 120, 124, and in tax cases has been narrowly construed against the domestic sovereign. Bowers *v.* New York & Albany Lighterage Co. 273 U. S. 346, 350. Compare United States *v.* Knight, 14 Pet. 301; Fink *v.* O'Neil, 106 U. S. 272.

sents. We cannot say that the public interest of the forum goes so far.

We lay aside questions not presented here which might arise if the national government, in the conduct of its foreign affairs, by treaty or other appropriate action, should undertake to restrict the application of local statutes of limitations against foreign governments, or if the states in enacting them should discriminate against suits brought by a foreign government. We decide only that in the absence of such action the limitation statutes of the forum run against a foreign government seeking a remedy afforded by the forum, as they run against private litigants.

Second. Respondent, relying on the New York rules that the statute of limitations does not run against a suit to recover a bank account until liability upon it is repudiated, *Tillman* v. *Guaranty Trust Co.*, 253 N. Y. 295, and that the statute of limitations does not run against a plaintiff who has no forum in which to assert his rights, *Oswego & Syracuse R. R.* v. *State*, 226 N. Y. 351, 369, 362; *Cayuga County* v. *State*, 153 N. Y. 279, 291; *Parmenter* v. *State*, 135 N. Y. 154, 163, argues that until recognition of the Soviet Government there was no person to whom notice of petitioner's repudiation could be given and no court in which suit could be maintained to recover the deposit.

It is not denied that, in conformity to generally accepted principles, the Soviet Government could not maintain a suit in our courts before its recognition by the political department of the Government. For this reason access to the federal and state courts was denied to the Soviet Government before recognition. *The Penza*, 277 Fed. 91; *The Rogdai*, 278 Fed. 294; *R. S. F. S. R.* v. *Cibrario*, 235 N. Y. 255; *Preobazhenski* v. *Cibrario*, 192 N. Y. Supp. 275. But the argument ignores the principle controlling here and recognized by the courts of New York that the rights of a sovereign state are vested in the state rather than in any particular government which may purport to represent it, *The Sapphire, supra*, 168, and that suit in its behalf may be maintained in our courts only by that government which has been recognized by the political department of our own government as the authorized government of the foreign state. *Jones* v. *United States*, 137 U. S. 202, 212; *Russian Government* v. *Lehigh Valley R. Co.*, 293 Fed. 133, 135, aff'd *sub nom.* *Lehigh Valley R. Co.* v. *State of Russia*, 21 F. (2d)

396, 409; *Matter of Lehigh Valley R. Co.*, 265 U. S. 573; *R. S. F. S. R.* v. *Cibrario, supra;* Moore, International Law Digest, §§ 75, 78.

What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government. Objections to its determination as well as to the underlying policy are to be addressed to it and not to the courts. Its action in recognizing a foreign government and in receiving its diplomatic representatives is conclusive on all domestic courts, which are bound to accept that determination, although they are free to draw for themselves its legal consequences in litigations pending before them. *Jones* v. *United States, supra,* 212; *Agency of Canadian Car & Foundry Co.* v. *American Can Co.*, 258 Fed. 363; *Lehigh Valley R. Co.* v. *State of Russia, supra.*

We accept as conclusive here the determination of our own State Department that the Russian State was represented by the Provisional Government through its duly recognized representatives from March 16, 1917 to November 16, 1933, when the Soviet Government was recognized.[4] There was at all times during that period a recognized diplomatic representative of the Russian State to whom notice concerning its interests within the United States

[4] The United States accorded recognition to the Provisional Government March 16, 1917 and continued to recognize it until November 16, 1933, when the Soviet Government was recognized. During that period the United States declined to recognize the Soviet Government or to receive its accredited representative, and so certified in litigations pending in the federal courts. The Penza, *supra;* The Rogdai, *supra.* It recognized Mr. Bakhmeteff as Russian Ambassador from July 5, 1917 until June 30, 1922, when he retired, having designated Mr. Ughet as custodian of Russian property in the United States. Mr. Ughet, after his appointment as Financial Attache April 7, 1917, continued to be recognized as such by the United States until November 16, 1933. He was recognized by the United States as Charge d'Affaires ad interim during the absence of the Ambassador from December 3, 1918 to July 31, 1919. Their diplomatic status as stated was certified in the present suit by the Secretary of State, who stated that he considered Mr. Ughet's status unaffected by the termination of the Ambassador's duties.

Their status was certified to by the Department on October 31, 1918 and July 8, 1919, respectively, in Lehigh Valley Railroad Co. v. State of Russia, 293 Fed. 133. Mr. Bakhmeteff's status as Ambassador was certified May 18, 1919 in Agency of Canadian Car & Foundry Co. v. American Can Co., 258 Fed. 363, 368; on April 6, 1920 in The Rogdai, 278 Fed. 294, 295; on June 24, 1919 in The Penza, 277 Fed. 91, 93. Certificate with respect to both Mr. Bakhmeteff and Mr. Ughet was given February 19, 1923 and with respect to Mr. Ughet December 22, 1927. On the faith of the two last mentioned certificates the Court, in the Lehigh Valley Railroad case, *supra,* as stated by the Government's brief in the present case, ordered to be paid to Mr. Ughet approximately $1,000,000, of which more than $700,000 was paid to the United States Treasurer "on account of interest due on obligations of the Provisional Government of Russia by the Treasurer."

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could be communicated, and to whom our courts were open for the purpose of prosecuting suits in behalf of the Russian State. In fact, during that period suits were brought in its behalf in both the federal and state courts, which consistently ruled that the recognized Ambassador and Financial Attache were authorized to maintain them.[5]

We do not stop to inquire what the "actual" authority of those diplomatic representatives may have been. When the question is of the running of the statute of limitations, it is enough that our courts have been open to suit on behalf of the Russian State in whom the right to sue upon the petitioner's present claim was vested, and that the political department of the Government has accorded recognition to a government of that state, received its diplomatic representatives, and extended to them the privilege of maintaining suit in our courts in behalf of their state. The right and opportunity to sue upon the claim against petitioner was not suspended; and notice of repudiation of the liability given to the duly recognized diplomatic representatives must, so far as our own courts are concerned, be taken as notice to the state whom they represented.

The Government argues that recognition of the Soviet Government, an action which for many purposes validated here that government's previous acts within its own territory, see *Underhill* v. *Hernandez*, 168 U. S. 250; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *Ricaud* v. *American Metal Co.*, 246 U. S. 304; *United States* v. *Belmont*, 301 U. S. 324; *Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71, 84, 85; *Luther* v. *Sagor & Co.*, [1921] 3 K. B. 532, operates to set at naught all the legal consequences of the prior recognition by the United States of the Provisional Government and its representatives, as though such recognition had never been accorded. This is tantamount to saying that the judgments in suits maintained here by the diplomatic representatives of the Provisional Government, valid when rendered, became invalid upon recognition of the Soviet Government. The argument thus ignores the distinction between the effect of our recognition of a foreign government with respect to its acts within its own territory prior to recognition, and the effect upon previous transactions consummated here

[5] Russian Government v. Lehigh Valley R. Co., 293 Fed. 183; 293 Fed. 135, aff'd 21 F. (2d) 396; State of Russia v. Bankers Trust Co., 4 F. Supp. 417, 419, aff'd 83 F. (2d) 236. See also Agency of Canadian Car & Foundry Co. v. American Can Company, 258 Fed. 363.

between its predecessor and our own nationals. The one operates only to validate to a limited extent acts of a *de facto* government which by virtue of the recognition, has become a government *de jure*. But it does not follow that recognition renders of no effect transactions here with a prior recognized government in conformity to the declared policy of our own government. The very purpose of the recognition by our Government is that our nationals may be conclusively advised with what government they may safely carry on business transactions and who its representatives are. If those transactions, valid when entered into, were to be disregarded after the later recognition of a successor government, recognition would be but an idle ceremony, yielding none of the advantages of established diplomatic relations in enabling business transactions to proceed, and affording no protection to our own nationals in carrying them on.

So far as we are advised no court has sanctioned such a doctrine. The notion that the judgment in suits maintained by the representative of the Provisional Government would not be conclusive upon all successor governments, was considered and rejected in *Russian Government* v. *Lehigh Valley R. Co., supra.* An application for writ of prohibition was denied by this Court. 265 U. S. 573. We conclude that the recognition of the Soviet Government left unaffected those legal consequences of the previous recognition of the Provisional Government and its representatives, which attached to action taken here prior to the later recognition.

Third. If the claim of the Russian Government was barred by limitation the United States as its assignee can be in no better position either because of the rule *nullum tempus* or by virtue of the terms of the assignment. We need waste no time on refinements upon the suggested distinction between rights and remedies, for we may assume for present purposes that the United States acquired by the assignment whatever rights then survived the running of the statute against the Russian Government, and that it may assert those rights subject to such plea of limitations as may be made by petitioner.

As has already been noted, the rule *nullum tempus* rests on the public policy of protecting the domestic sovereign from omissions of its own officers and agents whose neglect, through lapse of time, would otherwise deprive it of rights. But the circumstances of

the present case admit of no appeal to such a policy. There has been no neglect or delay by the United States or its agents, and it has lost no rights by any lapse of time after the assignment. The question is whether the exemption of the United States from the consequences of the neglect of its own agents is enough to relieve it from the consequences of the Russian Government's failure to prosecute the claim. Proof, under a plea of limitation, that the six-year statutory period had run before the assignment offends against no policy of protecting the domestic sovereign. It deprives the United States of no right, for the proof demonstrates that the United States never acquired a right free of a preexisting infirmity, the running of limitations against its assignor, which public policy does not forbid. *United States* v. *Buford,* 3 Pet. 12, 30; *King* v. *Morrall,* 6 Price 24, 28, 30.

Assuming that the respective rights of petitioner and the Soviet Government could have been altered and that petitioner's right to plead the statute of limitations curtailed by force of an executive agreement between the President and the Soviet Government, we can find nothing in the agreement and assignment of November 16, 1933, which purports to enlarge the assigned rights in the hands of the United States, or to free it from the consequences of the failure of the Russian Government to prosecute its claim within the statutory period.

The agreement and assignment are embodied in a letter of Mr. Litvinov, People's Commissar of Foreign Affairs of the Soviet Government, to the President and the President's letter of the same date in reply. So far as now relevant the document signed in behalf of the Soviet Government makes mention of "amounts admitted to be due or that may be found to be due it as the successor of prior governments or otherwise from American nationals, including corporations, companies, partnerships or associations." It purports to "release and assign all such amounts to the Government of the United States" and the Soviet Government agrees, preparatory to final settlement of claims between it and the United States and the claims of their nationals, "not to make any claims with respect to . . . (b) Acts done or settlements made by or with the Government of the United States, or public officials of the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof".

The relevant portion of the document signed by the President is expressed in the following paragraph:

"I am glad to have these undertakings by your Government and I shall be pleased to notify your Government in each case of any amount realized by the Government of the United States from the release and assignment to it of the amounts admitted to be due, or that may be found to be due".

There is nothing in either document to suggest that the United States was to acquire or exert any greater rights than its transferor or that the President by mere executive action purported or intended to alter or diminish the rights of the debtor with respect to any assigned claims, or that the United States, as assignee, is to do more than the Soviet Government could have done after diplomatic recognition—that is, collect the claims in conformity to local law. Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them. *United States* v. *Arredondo*, 6 Pet. 691, 748; *Haver* v. *Yaker*, 9 Wall. 32, 44; *Dooley* v. *United States*, 182 U. S. 222, 230; *Nielsen* v. *Johnson*, 279 U. S. 47, 52; *Todok* v. *Union State Bank*, 281 U. S. 449, 454. The assignment left unaffected the right of petitioner to set up against the United States the previous running of the statute of limitations.

Fourth. Respondent assails the finding of the district court that there was an unqualified repudiation by petitioner of its liability on the account, and in support of its contention presents an elaborate review of the evidence. The evidence is said to establish that petitioner's alleged repudiation was tentative and conditional, to await negotiations with a stable Russian government upon its recognition by the United States. If this contention be rejected, respondent insists that at least there is a conflict in the evidence and in the inferences which may be drawn from it which, under the local practice, should have been resolved by a full trial rather than summarily on motion. As these questions were not passed on by the Court of Appeals, the case will be remanded to that court for further proceedings in conformity with this opinion.

Reversed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.